Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband Providers	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Docket Nos. 95-20, 98-10

COMMENTS OF
BUSINESS TELECOM, INC., CTC COMMUNICATIONS CORP., FLORIDA DIGITAL NETWORK, INC., GLOBALCOM, INC. AND RCN TELECOM SERVICES, INC.

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TABLE OF CONTENTS

Page

SUMMARY

In what the Commission articulates for the first time in this proceeding as its primary goal to promote broadband services to all Americans, the Commission apparently contemplates sweeping changes to its regulation of wireline broadband Internet access services. Joint CLEC Commenters urge the Commission not to harm emerging competition, and the benefits that competition brings to consumers, by eliminating key ILEC obligations under key Title II provisions in the mistaken belief that doing so would promote the Commission's goal of access to broadband services for all Americans. The contemplated by the *NPRM* -- that some or all of the broadband transmission capability deployed by wireline common carriers would be removed from the obligations of Title II -- would not promote provision of broadband services to all Americans. Rather, for the reasons stated in these comments, deregulation of ILEC broadband capability would merely enhance the ILECs' ability to thwart competition and provide them greater flexibility to delay deployment of network improvements that such competition would otherwise compel them to make.

In order to promote its broadband goals, the Commission should instead reaffirm explicitly that ILECs' broadband capability is, and will continue to be, subject to Title II, all of the pro-competitive obligations of the 1996 Act, and the *Computer Inquiry* unbundling obligations. These regulatory requirements are the most effective way to encourage ILECs to deploy advanced broadband capability. In addition, the increased broadband competition that these regulatory requirements make possible will, in turn, help meet the Commission's broadband goals.

The Commission should determine that facilities-based wireline broadband Internet access service is a bundled offering of a telecommunications service (subject to Title II) and

information service. In most cases, facilities-based wireline broadband Internet access service provides the customer only a transparent transmission path to third party content providers in the same way that the voice network provides a pathway for end users to obtain various third party-provided audiotext information sources, such as stock quotes or banking information. In fact, end users demand and expect that the service provider will not change the format or content of information received from third party sources. In other instances, wireline broadband Internet access service providers use telecommunications to provide an information service, such as access to email stored on the provider's server. Wireline broadband Internet access is not a seamless information service because the transparent transmission path is functionally separate from information services and is perceived as such by end users.

The simple fact that the Commission for the last 25 years has asserted Title II jurisdiction over the transmission component of ILEC networks that non-facilities-based ISPs use to provide information services by itself demonstrates that this transmission component is subject to Title II. Thus, under *Computer Inquiry* requirements, which the *NPRM* correctly declares apply to ILECs, ILECs may use their own DSL services to offer high speed Internet access services, but, pursuant to Title II, are required to make DSL services available to other ISPs on a nondiscriminatory basis.

Moreover, applicable case law defining common carriage as well as all of the policy and public interest considerations underpinning common carrier designation require that this capability be subject to Title II and unbundling obligations. Under *NARUC I* and *II* and cases cited therein ILECs are making an offer to the public at large to provide telecommunications for a fee sufficient to trigger common carrier status for this transmission component of wireline broadband Internet access. Further, ILECs own and control the quintessential bottleneck

facilities – the local loop – that compels common carrier status under the Act and common law. Thus, an overwhelming public interest benefit of preserving the Title II requirement that ILECs offer to competitors the broadband capability is that this would help assure unbundled access by competitive carriers to broadband network elements under Section 251(c) of the Act. The ability of independent ISPs to obtain access to basic network functions on a competitive basis has been the foundation for the growth and success of the Internet and its attendant public interest benefits. It is hard to imagine a more compelling public interest justification for application of Title II obligations to ILEC broadband capability. Conversely, permitting ILECs to discriminate in favor of their own ISP operations to any significant extent would be a perfect recipe for ILECs to extend their monopoly control of the loop to the unregulated information services marketplace, which for 25 years the Commission has sought to avoid.

Continued application of Title II requirements would also assure the long term viability of universal funding which is applicable to entities that "provide" telecommunications or telecommunications service. Requiring ILECs to offer broadband capability as a telecommunications service would also preserve other important requirements that apply to provision of telecommunications service including CALEA, CPNI requirements, and access to telecommunications services by persons with disabilities.

Application of Title II to ILEC broadband capability is the best alternative to achieve the Act's goal of a deregulatory framework for provision of telecommunications. Under Section 10 of Title II, the Commission may deregulate when it is appropriate to do so under its forbearance authority. On the other hand, the Commission has no experience fashioning safeguards under Title I and the scope of the Commission's authority under Title I is unformed and untested. Accordingly, the Commission should fashion a deregulatory framework for broadband by

retaining Title II authority and deregulating as appropriate, rather than attempting to do so by sweeping all of broadband into Title I. This approach also permits establishment of an intermodal level playing field by applying Title II to all broadband platforms and forbearing or waiving rules where appropriate.

Elimination of Title II regulation of ILEC broadband capability is not necessary in order to permit ILECs to compete intermodally. ILECs are currently permitted to compete and provide broadband information services as customers of their own tariffed broadband telecommunications services. Under that framework, ILECs have succeeded spectacularly, experiencing record breaking growth in DSL subscribership.

The Commission should retain and strengthen *Computer III* safeguards against discrimination. The *Computer III* regulatory framework has been the foundation for the growth and success of the Internet. The *NPRM* does not make a compelling case that marketplace conditions have changed sufficiently, or at all, to permit elimination of *Computer III* safeguards. The *NPRM's* statements that those safeguards were somehow limited to the voice network are incorrect. The Commission in *Computer III* stated that it intended to, and did, fashion a framework that could accommodate the evolution of the network to a more advanced capability. Thus, key *Computer III* safeguards are not technology-specific. Instead, they are broad anti-discrimination requirements that can be, and are, equally applied in a narrowband or broadband environment. In particular, the requirement that ILECs provide Internet access as customers of their own tariffed services is fully at home and necessary in a broadband wireline environment.

The Commission should conclude this proceeding by reaffirming that LECs' broadband capability is fully subject to Title II and *Computer Inquiry* safeguards.

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COMMENTS OF
BUSINESS TELECOM, INC., CTC COMMUNICATIONS CORP., FLORIDA DIGITAL NETWORK, INC., GLOBALCOM, INC. AND RCN TELECOM SERVICES, INC.

Business Telecom, Inc. ("BTI"), CTC Communications Corp. ("CTC"), Florida Digital Network, Inc. ("FDN"), Globalcom, Inc. ("Globalcom") and RCN Telecom Services, Inc. ("RCN") (collectively, "Joint CLEC Commenters") submit these comments in response to the above-captioned notice of proposed rulemaking examining the appropriate regulatory framework for broadband access to the Internet over wireline facilities. [1]

I. INTRODUCTION

BTI is a facilities-based integrated communications provider offering voice and data communications services primarily to small and medium-sized business customers in the

Southeastern United States. BTI offers a full suite of integrated retail, including local, long distance, data, DSL, Internet access, web hosting, paging and other enhanced services. The Company also offers wholesale services, including switched, private line, special access and prepaid calling card services to other telecommunications carriers and end-user customers.

CTC has been in the telecommunications business for over 20 years. CTC began providing long distance service in 1994 and local resold services in 1998. CTC is also a facilities-based provider of converged local long-distance, data and Internet services which it provides over its packet-switched Integrated Communications Network to small and medium-sized business customers throughout the Northeast and Mid-Atlantic States via dedicated high capacity facilities connected to integrated access devices located on the Customer's premise. CTC's network spans the East Coast from Maine to Virginia. CTC's combined softswitch and packet-switched network architecture provides Class 5 switching capability throughout its entire network and enables CTC to provide facilities-based local dial tone in new markets throughout its footprint upon completion of its local interconnection arrangements with the ILEC. Because of the nature of the services CTC provides, it can provide those services more efficiently over broadband facilities, creating a one-third cost savings for consumers over providing the same services over a switched network. Therefore, for CTC and CLECs with similar service offerings, access to the ILECs broadband facilities is essential to being able to provide its services to consumers at a lower cost.

FDN is a Florida-focused, full-service provider of telecommunications services. FDN was founded in 1998 with the primary mission of offering high-quality service at lower prices to

[1] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed

small- and medium-sized businesses. FDN begin operating in Orlando, Fort Lauderdale and Jacksonville in 1999, and, in 2000, expanded to serve customers in West Palm Beach, Miami and the Tampa Bay area. FDN utilizes its own Nortel DMS-500 switching equipment located in local telephone company service offices, combined with unbundled network elements ("UNEs") purchased from incumbent local exchange carriers to serve its customer in Florida.

Globalcom operates as a facilities-based and resale competitive local exchange carrier ("CLEC"), long distance carrier, Digital Subscriber Line ("DSL") provider, Internet Service Provider ("ISP") and/or wireless carrier nationwide. Globalcom is authorized to provide local exchange telecommunications services in six states and intrastate telecommunications services in twenty-six states. Globalcom's customers are predominantly small and medium-sized businesses. Globalcom's facilities-based networks principally employ Nortel DMS-500 Supernode digital switches, Cisco 7576 series Internet routers, and a 100% fully redundant fiber optic backbone.

RCN and its operating affiliates and subsidiaries are in the process of building high-speed, high-capacity advanced fiber optic networks to provide a package of services, including local and long distance telephone, video programming and data services to residential and business customers. RCN is a facilities-based provider of bundled telephone, cable television, and Internet access services in the Boston, Chicago, New York, Philadelphia, Washington D.C., San Francisco and Los Angeles metropolitan area markets. RCN's focus is on the provision of service to residential customers. RCN is also the largest OVS operator in the country, and one of the largest broadband overbuilders with subscribers in 7 of the 10 largest markets in the U.S.

Rulemaking, CC Docket No. 02-33, FCC 02-42, released February 15, 2002 ("*NPRM*").

Joint CLEC Commenters applaud the Commission on its efforts to promote the availability of broadband services to all Americans through this and other proceedings. As facilities-based telecommunications providers, the Joint CLEC Commenters are likely to be affected by any final rules adopted by the Commission in this proceeding; and would certainly be adversely affected by any reduction or elimination of the regulation of ILEC broadband services. Moreover, the reduction or elimination of regulatory oversight of ILEC provision of broadband services is likely to give ILECs the opportunity to refuse competitors access to the facilities necessary to provide broadband services so as to greatly limit the ability of competitors to offer broadband access services and to favor the ILEC's own ISPs. Accordingly, in determining how to accomplish its goal of increasing the availability of broadband services, the Commission must bear in mind that any changes to its rules that effectively eliminate a competitor to the ILEC will, in the long-run, negatively affect the availability of broadband services to consumers.

II. THE PROVISION OF FACILITIES-BASED WIRELINE BROADBAND INTERNET ACCESS SERVICE BUNDLES A TELECOMMUNICATIONS SERVICE AND AN INFORMATION SERVICE

A. Wireline Broad Internet Access Services Consists of A Transparent Transmission Service And An Information Service

The Commission, in the *NPRM*, stated that:

> [a]n entity provides 'telecommunications' (as opposed to merely using telecommunications) when it both provides a transparent transmission path and it does not change the form or content of the information.[2]

The Commission further stated that:

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[2] *NPRM*, para. 25.

> it seems as if a provider offering the [broadband wireline Internet access] service over its own facilities does not offer 'telecommunications' to anyone, it merely uses telecommunications to provide end users with wireline broadband Internet access service.[3]

Based on these statements, it is clear that self-provisioned wireline broadband Internet access is a bundled offering of a telecommunications service and information services in those cases where the provider is providing telecommunications. In such cases, the provider is providing no more than a transparent transmission path, and does not change the form or content of the information accessed. In contrast, in other cases, a provider is merely using telecommunications to provide an information service.

The fact is that in most cases where an entity is providing Internet access, an Internet access customer utilizing that service is using, and the access provider is providing, no more than a transparent transmission path. While many applications provide users the capability to change the appearance and format of content they receive or send, these capabilities are not provided by the wireline access provider. Rather, these capabilities are provided by software in the end user's computer and/or by the information content provider the end user chooses. In the context of Web access for example, changes in the appearance of information on the user's screen are controlled and determined by either the end user or the content provider. In addition, the IP protocol starts on the end user's computer and is transmitted unchanged by the ISP. The user also controls the points on the Internet to which he is connected. Thus, to a large degree, Internet access service involves no more than provision of a transparent transmission path. As some telecommunications experts have observed:

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[3] *Id.*

> And any service provider whose core business is to transmit TCP/IP-encoded traffic is – as a matter of pure technological definition – providing pure carriage. As described above, TCP/IP places *complete* control over routing, addressing, origin, destination, and content itself in the hands of the originating computer. Any forced bundling in this environment has to be contrived, concocted and clumsily grafted onto the underlying carriage. TCP/IP is the universal protocol of *unbundled, equal access* carriage – a protocol that is content-neutral, network-neutral, medium-neutral. It is, in short, the purest form of "common carriage."[4]

Moreover, the simple fact that an end user uses the transmission path provided by the wireline provider to connect to content providers does not in and of itself render the transmission service an information service. The traditional telephone network has always provided users the ability to retrieve information and to connect to numerous sources of stored information such as banking information, stock quotes, news, entertainment information, horoscope, weather, and time of day. Such use of the voice network by the end user is conceptually identical to use of Internet access to retrieve information on the Web. Further, like the traditional voice network, there is a charge associated with use of the pure transmission path that is part of the total charge for wireline broadband Internet access.

On the other hand, there are instances where the wireline provider is using the pure transmission path capable facilities to provide information services functions, rather than providing telecommunications.

Therefore, on its face, wireline broadband Internet access is a bundled offering of telecommunications and information service because sometimes the wireline provider is providing no more than telecommunications and at other times it is using telecommunications to provide an information service. Consequently, the Commission may, and should, conclude that

[4] Michael Kellogg, John Thorne and Peter Huber, Federal Telecommunications Law, Section 11.8.1, Second Ed., 1999.

the self-provisioned, transparent transmission function of wireline broadband Internet access is a telecommunications service when provided to, and used by, the end user.

B. Wireline Broadband Internet Access Is A Bundled Offering Not a Single Intertwined Service

The Commission has recognized that merely combining an enhanced service with an information service offering for a single price does not always constitute a single information service offering. Therefore, in determining whether a wireline Internet access offering is a single information service or a bundled offering of information service and telecommunications service for one price, the "issue is whether, functionally, the consumer is receiving two separate and distinct services."[5] Previously, the Commission has concluded that Internet access should be classified as a single information service because it offers end users information service capabilities inextricably intertwined with data transport.[6]

In tentatively concluding in the *NPRM* that wireline broadband Internet access service is a single information service offering, the Commission failed to explain why such access is not, in fact, two functionally separate and distinct services. By statutory definition, telecommunications is functionally different than other add-ons that could constitute an information service, such as changes in the form and content of information. Therefore, when providers are providing no more than a pure transmission service they are offering something that is functionally separate and distinct from the information services that are provided at in different forms and at times as selected by the user.

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[5] *Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing End User Common Line Charge, Fourth Order on Reconsideration,* CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, FCC 97 97-420, 13 FCC Rcd 5318, 5474-75 ¶ 282 (1997).

Thus, it is possible that the "functionally separate" test previously enunciated by the Commission is intended to be resolved at least in part by reference to customer perception. Even so, it would seem obvious in this case also that customers know when they are receiving a pure transmission path and when the provider is manipulating the content. In fact, consumers demand and expect that when they use an Internet access service to access Websites that the access provider will not change the form or content of the information provided by the third party content provider. Therefore, users correctly perceive that the provision of access to Websites is the provision of a pure transmission path that does not change the form of the content accessed. Accordingly, under the Commission's "functionally separate" test, wireline broadband Internet access is provision of both a telecommunications service and an information service.

As noted, a meaningful application of the "functionally separate" test should rest at least in part on an empirical or factual examination of functionalities and/or customer perceptions. However, the *NPRM* provides no such empirical or factual analysis or studies that could support the conclusion that the transmission component of wireline broadband Internet access is functionally "inextricably" intertwined with information service functions, most of which are in any event provided by the user's software or third party content providers, not the access provider. Therefore, the *NPRM* does not provide a basis for concluding that facilities-based wireline broadband Internet access is a single information service offering. On the contrary, the "functionally separate" test reveals that facilities-based wireline broadband Internet access providers offer a separate telecommunications service because they provide the facilities that constitute the transparent transmission path.

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[6] *Id.* para. 80.

C. The Transmission Component of Wireline Broadband Internet Access Should Be Classified As A Telecommunications Service in Light of Industry Trends

Expert industry observers have predicted that the traditional circuit switched network will soon be replaced by a network providing all services as applications traveling over digital packet-switched facilities using IP protocol.[7] In fact, some CLECs, including CTC, are already utilizing packet-switching facilities, which enables them to provide a broader range of services at a lower cost than what ILECs charge.[8] In a packet-switched environment, all services, including voice, will be merely different software defined applications traveling over digital packetized transmission services. Moreover, in this environment, there will be no meaningful distinction between the network and the Internet. Rather, the Internet will be the network. Therefore, the Commission should determine that provision of a transparent transmission path to the Internet is a telecommunications service. This will provide a consistent approach for establishing an appropriate deregulatory framework in the context of Title II for provision of telecommunications services where appropriate, such as where the carrier lacks market power. However, in such an environment, the classification of all facilities-based uses of Internet access service as one seamless information service is untenable.

D. The Commission Should Resolve the Statutory Classification Issue In The *NPRM* In Light of Policy Goals and Objectives

In its previous analyses and application of the statutory definitions of telecommunications and information services, and before that of the definitions of enhanced and basic services, the Commission resolved classification issues in light of the policy goals and objectives of the

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[7] *See The Local Exchange Network in 2015*, Lawrence R. Vanston, Ph.D., Technology Futures, Inc. (2001).

applicable statutes. The Commission established its definitions of basic and enhanced services in order to assure that information services providers would not be unnecessarily regulated as common carriers while assuring that telephone companies are not able to leverage control of the local network into control of the information services market as well.

As explained above, broadband wireline Internet access consists in part of a telecommunications service when the facilities-based provider provides a pure transmission path to the Internet. To the extent the Commission perceives any doubt on this issue, however, it should resolve the statutory classification issues raised in this proceeding in light of the serious policy issues and consequences of some possible outcomes of this proceeding.

For example, one apparent possible outcome of this proceeding that has been widely reported in press reports and elsewhere is that ILEC broadband capability would be deregulated by defining it as an information service, and therefore removing it from Title II oversight. At the same time, the Commission might eliminate *Computer Inquiry* unbundling obligations and other safeguards against discrimination.

It is hard to imagine a more alarming prospect to CLECs, to competition, and to broadband deployment. Reclassification of ILEC broadband capability as an information service to any significant extent will provide the ILECs a pretext to undermine the availability of Section 251(c)(3) unbundling of broadband network elements. In addition, classification of wireline broadband Internet access service as an information service would also threaten the long term viability of universal service programs because under the Act only <u>providers</u> of telecommunications or telecommunications service fall squarely under the statutory obligation to

[8] Comments of Association for Local Telecommunications Service, *et al*., CC Docket No. 01-338, filed April

contribute to universal service funding. Removal of safeguards against discrimination would also permit ILECs to further extend their dominance in wireline broadband Internet access beyond the 93% of customers they already possess. Removal or weakening of safeguards against discrimination would remove the foundation for the growth and success of the Internet. Nor would these deregulatory steps promote broadband deployment. Any of these considerations alone would warrant maintaining a framework in which ILEC broadband capability continues to be categorized as telecommunications service. Together, they present on overwhelming case that the Commission should promptly determine that it will continue to define ILECs' provision of broadband services as common carriage subject to existing, or even strengthened, Title II safeguards against discrimination.

III. THE TRANSMISSION COMPONENT OF FACILITIES-BASED WIRELINE BROADBAND INTERNET ACCESS SERVICE IS ALREADY, AND SHOULD REMAIN, SUBJECT TO TITLE II

The fact that the transmission component of wireline broadband Internet access services is already subject to Title II alone demonstrates the error raised by the NPRM's proposal that the transmission component of wireline broadband Internet access service be subject only to Title. The Commission already has an appropriate regulatory framework in place for broadband wireline Internet access, pursuant to which ILECs may, and in fact are, offering broadband Internet access over their own facilities. The Commission's goal, as articulated in the *NPRM*, to determine the appropriate framework for broadband wireline Internet access is therefore not necessary. Under long-standing *Computer II* rules adopted by the Commission pursuant to its authority under Title II "carriers that own common carrier transmission facilities and provide

5, 2002, p. 14.

enhanced services must unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations."[9] In short, any view that the transmission component of wireline broadband Internet access is subject only to Title I is refuted by the fact that the Commission has already asserted Title II authority over such service.

A. The Telecommunications Component of Wireline Broadband Internet Access Is Subject to Title II Under *NARUC I* and *II*.

Apart from the fact that the transmission component of wireline broadband Internet access is already subject to Title II, the traditional test for common carriage also requires that it be, and remain, subject to common carrier regulation.

The Act defines a common carrier as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio . . . ."[10] The Commission's regulations further define common carrier as "an person engaged in rendering communications service for hire to the public."[11] The U.S. Court of Appeals for the D.C. Circuit in *NARUC I* and *II* [12] found these rules did not provide a clear enough standard and thus established a test for determining whether an activity constitutes communications common carriage. Specifically, the D.C. Circuit deemed that the "critical point" in determining whether an activity is common carriage is the "quasi-public character of the activity involved," *i.e.*, "that the carrier undertakes to carry for all

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9 ***Indep. Data Communications Manuf. Ass'n., Inc. Petition for Declaratory ruling and Am. Tel. and Tel. Co. Petition for Declaratory Ruling, 10 FCC Rcd 13717, 13719 (1990) ("Frame Relay Order").***

10 47 U.S.C. § 153(10).

11 **47 C.F.R. § 21.2**

12 *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*"); *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 533 F.2d 601 (D.C. Cir. 1976) ("*NARUC II*").

people indifferently."[13] The key to this test is not how large a clientele the carrier serves, but rather the "holding oneself out to serve the public indiscriminately."[14] This quasi-public character will arise either out of a legal compulsion to serve the public indifferently or reasons implicit in the nature of the operations to expect an indifferent holding out to the eligible user public.[15] Common carrier service is distinguished from private carriage which is "set aside for the use of particular customers, so as to not be generally available to the public."[16] Private carriage is, in turn, characterized by a "clientele that might remain relatively stable, with terminations and new clients, the exception rather than the rule."[17] A provider of private carriage would desire and expect to negotiate with and select future clients on an individualized basis.[18]

In *NARUC II* the Court added a second prong to the test for common carriage, *i.e*. that customers "transmit intelligence of their own design or choosing."[19] The key consideration in this aspect of the common carriage test is whether the content of the transmission may be under the customer's control. This "control" can be as simple as the decision whether to transmit information or not.[20] After the D.C. Circuit's *NARUC I* and *II* decisions, the Supreme Court adopted a definition of communications common carrier that adopted the D.C. Circuit's approach. The Supreme Court defined a communications common carrier as a carrier "that makes a public offering to provide [communications facilities] whereby all members of the

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13 *NARUC I* at 641.

14 *Id.* at 642.

15 *Id.*

16 *Id.*

17 *Id.* at 643.

18 *Id.*

19 *Id.* at 609.

public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing."[21]

Applying these principles to the transmission component of facilities-based wireline broadband Internet access service leads to the inescapable conclusion that it is a common carrier offering subject to Title II, which, as noted, is already the case in any event. The legal compulsion to serve part of the *NARUC I* test is met by the current regulatory requirement, adopted in *Computer III*, that LECs may provide information services, including Internet access, as customers of their own tariffed offering of the transmission service.

> Moreover, even if the *Computer III* legal compulsion to provide the underlying transmission service on a common carrier basis did not exist, the ILEC's offering of the underlying transmission service meets the test for common carriage because ILECs are offering to provide the telecommunications portion of the service indiscriminately to the public at large. ILECs typically do not deal on an individual basis with millions of consumers. Instead, they undertake through their tariffs to provide service to all consumers on the same terms and conditions. Indeed, offering uniform terms and conditions to all consumers is the only way ILECs could provide mass services. As discussed previously, the transmission component of self-provisioned wireline broadband Internet access is a separate offering to provide a pure transmission path for access to content on the Internet. Users expect and use the transparent transmission component as such, even though they may also choose to receive more functions from the provider. When users choose to receive additional provider functions, the providers uses the telecommunications component to provide an information service. Therefore, the transmission component of facilities-based wireline broadband Internet access service is a common carrier offering under *NARUC I*. Given the apparent intent of the *NPRM* to remove the transmission component of facilities-based wireline broadband Internet access from the common carriage umbrella, it is important to note that the D.C. Circuit in *NARUC I* limited the FCC's discretion to apply or not common carrier status. The Court held:Further, we reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve. The common law definition of common carrier is

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20 *Id.* at 610.

21 *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979).

> sufficiently definite as not to admit of agency discretion in the classification of operating communications entities. A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so. Thus, we affirm the Commission's classification not because it has any significant discretion in determining who is a common carrier, but because we find nothing in the record or the common carrier definition to cast doubt on its conclusions that SMRS are not common carriers.[22]

Thus, the Commission may not, for example, refrain from applying Title II to the transmission component of wireline facilities-based broadband Internet access based on the misguided view that this would promote deployment of broadband.[23] Rather, the transmission component of wireline broadband Internet access is fully subject to regulation as common carriage under *NARUC I*.

B. Possession By ILECs of Market Power in the Wireline Broadband Marketplace Requires Application of Title II

1. ILECs Continue to Control Bottleneck Facilities Essential to Accessing the Information Marketplace

While the application of Title II does not turn on dominant carrier status, possession of market power nonetheless fully justifies assertion of Title II jurisdiction. Based on the record established in the *Non-Dom Proceeding*,[24] Joint CLEC Commenters are confident that the Commission will conclude that ILECs are dominant in provision of wireline broadband common carriage. This dominance is attributable to the fact that only ILECs possess the ubiquitous loops and transport facilities necessary to reach consumers and businesses. As the Commission has

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22 *NARUC I.* at 644.

23 Although the Court held that while the Commission has little discretion in defining what should be a common carrier service as a non-common carrier service, the Court intimated that the Commission may have some discretion to refuse to exercise its common carrier regulatory powers. *NARUC II* at 620. Thus, as discussed below, to the extent the Commission chooses to deregulate ILEC provision of broadband, it may do so only under Title II.

24 *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services,* Notice of Proposed Rulemaking, CC Docket No. 01-337, FCC 01-360, released December 20, 2001 ("Non-Dom Proceeding").

long recognized, the ILECs exclusive control of essential facilities gives them the ability, absent regulatory safeguards, to leverage control of these bottleneck facilities into control of the information services marketplace. Consequently, in the absence of appropriate regulatory safeguards, ILECs can engage in systematic discrimination against CLECs and other competitors, and, as discussed herein, are continually attempting to do so even under current safeguards.

In its proceeding addressing the proper regulatory treatment of ILEC broadband services the Commission recognized that ILECs continue to have market power with respect to basic local exchange service and that broadband services are provided over the same local exchange and exchange access facilities.[25] Thus, ILECs' demonstrated ability to provide a broadband capability stems in part from their ability to piggy-back the construction of broadband facilities upon the core voice telephone network.[26] This capability gives the ILECs a significant economic advantage of integration that is unavailable to competing, non-integrated providers. Significantly, ILECs can, and in fact are, leveraging this integration in a manner that effectively excludes CLECs, and thus competition, from significant segments of the market. As economists Robert Hall and William Lehr argue*:*

> But the on-ramps to the information highway remain in the hands of the monopolists. The last mile of the telecom network lacks the competition that has invigorated the rest of the network. The last mile remains in the hands of the traditional phone companies, the Bells. Bell control of the last mile means that continuing regulation is essential. Because homeowners and small businesses

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[25] *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337, FCC 01-360, ¶ 6, released December 20, 2001 ("*ILEC Broadband NPRM*"). As Chairman Powell notes in his separate statement (at page 1) the ILECs remain "clearly dominant" in local exchange service.

[26] For instance, Project Pronto, which SBC is using to spur deployment of broadband services, is an overlay of the existing SBC voice network meaning it will not displace existing network facilities.

> rarely have ways to gain access to the telecom network apart from the Bells' last mile connections, the Bells could extract full monopoly value of the network if they were not regulated. As competitive service providers add value to telecom products, the Bells would absorb that value through higher prices for the last mile, and consumers would be denied the benefit of added value.[27]

The ILEC's overwhelming share of the wireline broadband market is shown by the fact that of the reported 2.7 million high-speed DSL lines in the United States, approximately 93% of these lines were reported by ILECs; approximately 86% were reported by the Regional Bell Operating Companies ("RBOCs"); and only approximately 7% were reported by non-ILECs.[28] ILEC DSL customer growth rates are now fast outstripping CLEC customer growth rates.[29] If ILECs are released from their common carrier obligations to provide service on demand,[30] at tariffed rates that are just and reasonable,[31] without unreasonable discrimination,[32] and their interconnection and unbundling obligations with respect to facilities used to provide information services,[33] then the ILECs will be able to achieve their objective to drive competitors that rely on their facilities out of the market.[34] Accordingly, ILECs' dominance in the wireline broadband

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[27] Robert E. Hall and William H. Lehr, *Promoting Broadband Investment and Avoiding Monopoly,* at 3 (Feb. 21, 2002).

[28] *FCC Releases Report on the Availability of High Speed and Advanced Telecommunications Capability*, FCC Press Release (Feb. 6, 2002)

[29] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* CC Docket No. 98-146, Third Report at ¶ 51 (Feb. 6, 2002).

[30] 47 U.S.C. § 201(a).

[31] 47 U.S.C. § 203; § 201(b).

[32] 47 U.S.C. § 202.

[33] 47 U.S.C. §§ 251, 252.

[34] Further, ILECs can and have used their monopoly status in the DSL market to leverage their position in the voice market by combining DSL and voice pricing and by refusing to provision DSL services to CLEC UNE voice customers on the same terms and conditions as the ILECs provision their own customers.

marketplace fully justifies the continuation of Title II authority over the transmission capability of facilities-based broadband wireline Internet access.

2. Dominant Facilities-Based Carriers Should not be Permitted to Take Advantage of the "Contamination Doctrine" to Avoid Regulatory Oversight

When formulating its *Computer II* and *III* rules, the Commission rejected the application of the contamination doctrine to basic and enhanced services provided by facilities-based dominant carriers such as the RBOCs. Under the "contamination doctrine," a combination of basic and enhanced service could be treated in its entirety as a single unregulated enhanced service.[35] Thus, when a common carrier transmission service is combined with an information service and provided to an end user as a single information service, the information service "contaminates" the communication service and removes it from common carrier regulation.[36] The Commission recognized that if it applied this doctrine to facilities-based carriers, at some point conventional exchange service also would become unregulated because it would be contaminated by the enhanced services travelling over it.[37] The fact of the matter is that the point in time has arrived, as evidenced by CTC's converged product offering. The Commission noted that this would be an "improper policy result if exchange service remains, as it is now, a near monopoly otherwise warranting regulation."[38] Therefore, the Commission noted that for

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[35] *Amendment of Section 64.702 of the Commission's Rules,* Notice of Proposed Rulemaking, CC Docket No. 85-229, Third Computer Inquiry, 50 FR 333581, ¶ 32 (1985).

[36] Reply Comments of EarthLink, Inc., GN Docket No. 00-185, filed January 31, 2002, at 31 (Jan. 10. 2001), *citing*, *Frame Relay Order*, 10 FCC Rcd. At 13719.

[37] *Id.*

[38] *Id.*

carriers with market power:Conversely, the offerings of dominant carriers are often monopoly or near-monopoly ones. Such offerings are needed and used by competitors and can be manipulated anticompetitively. Ensuring that such offerings continue to be made subject to the common carrier duties of reasonableness and avoidance of unreasonable discrimination serves important policy goals. We propose below to develop policies that apply such a dominant/non-dominant entity split.[39]

SBC notes on its website that it is working on enabling access for consumers to an "integrated package of broadband access, premium data and Internet services and telephony."[40] SBC also notes that it will "Network your PCs and Internet devices using existing telephone wires - no new wiring required."[41] Even more compelling, is that CTC, a rapidly growing CLEC utilizing a next generation communications network, is already providing its customers with converged voice, data, Internet and video services. Under the contamination doctrine, the telephony aspect of SBC's proposed package of services would escape regulation because it would be bundled with the information service offerings. Since ILECs remain dominant in provision of wireline broadband and competitors remain virtually exclusively reliant on ILECs for transmission capacity, the Commission should not prematurely deregulate ILECs.[42] Rather,

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[39] *Id.* In contrast, the Commission noted that applying the contamination doctrine to carriers that lacked market power, did not have underlying facilities, and purchased transmission capacity from other parties via tariff would be sensible since no policy goal is served by regulating any aspect of these entities' offerings. *Id.* at ¶ 46, n. 34.

[40] *See* http://www.sbc.com/data_capabilities/0,5931,1,00.html

[41] http://www.swbell.com/content/0,3854,7,00.html

[42] In Florida, for instance, 95% of all high-speed data lines in BellSouth territory are provided by BellSouth in a wholesale or retail capacity. This dominance is fostered by the fact that well over 80% of BellSouth's access lines in Florida are served through either copper or fiber fed DLC. *See* Hearing Transcripts and Exhibits in Florida Public Service Commission Dockets Nos. 010098-TP, 960786-TP, and 99069-TP.

the Commission should continue to reject the application of the contamination doctrine to ILECs and to separately regulate the transmission component of Internet access service that ILECs provide over their own facilities.

IV. TITLE II PROVIDES THE COMMISSION THE BEST FRAMEWORK TO ESTABLISH DEREGULATION WHILE MAINTAINING APPROPRIATE COMPETITIVE SAFEGUARDS

A. The Commission's Authority Under Title I May Not Be Sufficient to Enable The Commission To Establish Adequate Safeguards for ILEC Participation in the Broadband Information Services Market

In the *NPRM*, the Commission seeks comment on the possibility of applying a "minimal regulatory Title I regime" to wireline broadband Internet access services and the implications this would have on nondiscriminatory access objectives.[43] Before determining how it should apply a regulatory regime under Title I, the Commission should at this point seriously question whether it would have sufficient authority under Title I to fashion adequate safeguards. As the Commission has stated, Title I identifies the various subject matters over which the Commission may exercise authority pursuant to other Titles in the Act:

[43] *NPRM* at ¶¶ 16, 50.

> Section 1 of the Communications Act established the Commission "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States ... adequate facilities at reasonable charges ...." Similarly, Section 2 gives us jurisdiction over "all interstate and foreign communication by wire or radio" and "all persons engaged within the United States in such communication ..." Finally, Section 3 defines "communication by wire" and "communication by radio" as including "the transmission ... of writing, signs, signals, pictures and sounds of all kinds ... including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."[44]

However, as the U.S. Court of Appeals for the Ninth Circuit has held, the mere identification of the subject matters over which the Commission has authority is not an independent source of authority:

> Title I is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission's specific statutory responsibilities. *See United States v. Southwestern Cable Co.,* 392 U.S. 157, 178, 88 S.Ct. 1994, 2005, 20 L.Ed.2d 1001 (1968) (FCC's Title I power "restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities"). In the case of enhanced services, the specific responsibility to which the Commission's Title I authority is ancillary to its Title II authority is over common carrier services. *See CCIA v. FCC,* 693 F.2d 198, 213 (D.C.Cir.1982) (upholding FCC regulation of enhanced services as ancillary to Commission's authority over interstate basic telephone services); *GTE Serv. Corp. v. FCC,* 474 F.2d 724, 731 (2d Cir.1973) (same).[45]

Obviously, the Commission's ancillary authority over broadband Internet access service under Title I does not provide the same degree of authority as the Commission's direct authority over such service under Title II. Moreover, for the Commission to exercise Title I jurisdiction over wireline broadband Internet access service that exercise of jurisdiction would need to be

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[44] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations By Time Warner Inc. and America Online Inc., Transferors, to AOL Time Warner, Inc., Transferee*, CS Docket No. 00-30, Memorandum Opinion and Order, FCC 01-12, ¶ 148 (2001).

[45] *California v. FCC*, 905 F.2d 1217, 1240 (9th Cir. 1990) ("*California I*").

ancillary to the Commission's Title II jurisdiction over common carrier services. If, however, the Commission finds no common carrier component to the Internet access service, and therefore no basis for exercise of its Title II jurisdiction, it may undercut the basis of its ancillary jurisdiction under Title I. Accordingly, it is not clear as an initial matter to what extent the Commission could exercise any affirmative authority over wireline broadband Internet access under Title I.

Further, to date, the Commission has not established a comprehensive scheme of regulation under Title I and, more specifically, has not chosen to impose any regulation of information services under Title I. As a result, ILECs are currently free to discriminate in provision of services subject only to Title I such as billing and collection services[46] and voice mail service. In fact, the Commission's affirmative exercise of Title I jurisdiction has mainly been limited to preempting state regulation. For instance, when the Commission detariffed ILEC provisioning of inside wiring, it also used its Title I jurisdiction to preempt states from tariffing the service.[47] Likewise in *Computer III*, the Commission attempted to preempt nearly all state regulation of enhanced services.

The Commission's characterization of it proposed application of Title I as a "minimal . . . regulatory regime" minimizes the limitations of the Commission's Title I jurisdiction the Commission has previously recognized. For instance, the Commission has recognized the inadequacy of regulation under Title I by noting in regard to ILEC validation and screening services for calling cards that "regulation of these services under Title I ancillary jurisdiction, as

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[46] *Detariffing of Billing and Collocation Services*, 102 FCC 2d 1150 (1986).

suggested by some of the LECs, might not be adequate to ensure provision of these services on a non-discriminatory basis, under just, reasonable and non-discriminatory terms and conditions."[48] Accordingly, the Commission opted for Title II regulation of those services.[49] The Commission should likewise retain Title II regulation over the transmission component of ILEC provision of broadband Internet access in order to be assured that it will have adequate authority to maintain necessary safeguards against discrimination.

B. The Commission May Deregulate Wireline Broadband Internet Access Under Title II Where Appropriate

As noted, Title II provides the Commission adequate authority for implementing competitive safeguards; however, it is also permits deregulation where appropriate. Although Title II sets forth a full spectrum of powers and authority for the Commission, there is nothing that requires the Commission to apply the full scope of its authority under Title II. For example, it is well known that "non-dominant" carriers are subject to Title II, but are only subject to minimal specific requirements, while "dominant" carriers appropriately remain subject to more extensive oversight.[50] Section 160 of the Act gives the Commission flexibility to deregulate by specifically allowing the Commission to forbear from applying provisions of the Communications Act, save for interconnection and Section 271 provisions, if certain conditions

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47 *Promotion of Competitive Networks In Local Telecommunications Markets*, WT Docket No. 99-217, CC Docket No. 96-98, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217 and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, ¶ 56 (1999).

48 *Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, CC Docket No. 91-115, Report and Order and Request for Supplemental Comment, FCC 92-168, ¶ 25 (1992).

49 *Id.*

50 *Federal Telecommunications Law* at § 3.11. This is not to say that the solution is to classify the ILECs as non-dominant in the provision of broadband services. The record in CC Docket No. 01-337 that such a reclassification is not warranted at this time. When conditions in the marketplace change such that ILECs are "non-dominant" then the Commission can adjust Title II obligations as warranted.

are met.[51] Therefore, the Commission has ample flexibility under Title II to respond to marketplace conditions; it does not need to apply Title I regulation in order to do so.

C. "Private Carriage" Does Not Provide An Adequate Basis For Regulation

The Commission's suggestion about the possibility of regulation of facilities-based wireline broadband Internet access service as private carriage or by oversight of contracts is also inappropriate for several reasons. As an initial matter, wireline broadband Internet access service does not constitute private carriage. As noted, for practical and other reasons, ILECs offer service to end users and to the thousands of ISPs in their regions on a public offering basis. Although ILECs can determine on an individual basis with each customer the terms upon which they will provide service, those contracts are subject to Title II and are not considered private carriage.

Even if ILECs were likely to use individual contracts, any attempt to regulate these individual contracts outside of Title II could be particularly problematic for the Commission and all concerned. Under the *Sierra Mobile* doctrine, an agency may modify a private contract that may "cast upon other consumers an excessive burden," but the agency must first conduct a formal investigation of the contract and determine that it is unjust, unreasonable, unduly discriminatory or preferential.[52] Thus, unlike tariffs under Section 204(a), which the Commission can suspend and investigate, the private contract would continue in force until the Commission concluded its investigation. Moreover, the Commission may only modify the

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[51] 47 U.S.C. § 160.

[52] *See FPC v. Sierra Pacific Power Co.,* 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956). The doctrine has been applied to the FCC. *See Bell Tel. Co. of Pa. V. FCC*, 503 F.2d 1250, 1275-1282 (3d Cir. 1974).

contract, when the contract's terms "adversely affect the public interest."[53] As the Commission has noted:

> The threshold for demonstrating sufficient harm to the public interest to warrant contract reformation under the Sierra-Mobile doctrine is much higher than the threshold for demonstrating unreasonable conduct under sections 201(b) and 202(a) of the Act. Thus, a carrier cannot obtain the remedy of contract reformation by showing only that the contract requires it to pay an unduly high price for communications services. Such private economic harm, standing alone, lacks the substantial and clear detriment to the public interest required by the Sierra-Mobile doctrine.

Accordingly, a private carriage or contract approach to regulation of the transmission component of broadband wireline Internet access service would impose undue burdens on regulators and, in any event, provides insufficient assurance of reasonable terms and conditions of service.

D. Title II Common Carrier Treatment Of The Transmission Component Supports Section 251(C)(3) Unbundling Obligations

As demonstrated above, the transmission component of wireline broadband Internet access has all of the indicia of a telecommunication service and should be made available on a common carrier basis.[54] Therefore, even if the Commission classifies wireline broadband Internet access service as an information service, it should continue to require local exchange carriers to offer the transmission component of such services as telecommunications services. A critical factor underlying a common carrier classification of these transmission services is the need to preserve the unbundling requirements of Section 251(c)(3).[55] Classifying such services as telecommunications services will help assure eligibility of competing broadband access

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[53] *IDB Mobile Communications, Inc. v. Comsat Corporation*, File No. E-97-48, Memorandum Opinion and Order, FCC 01-173, ¶ 15 (2001).

[54] *See supra*Section II. A.

[55] 47 U.S.C. § 251(c)(3).

providers for unbundled access to network elements necessary to provide competing services under statutory standards. [56]

Section 251(c)(3) requires ILECs to provide telecommunications carriers with non-discriminatory access to unbundled network elements "*for the provision of a telecommunications service*."[57] Section 153(29) defines a "network element" as "a facility or equipment *used in the provision of telecommunications services*."[58] The primary purpose of the unbundling requirements is to promote competition. As noted herein, ILECs continue to control the bottleneck facilities necessary to provide broadband access services.[59] Absent a clear "telecommunications service" classification, the ILECs will have an incentive to designate separate network facilities as facilities used for broadband services and attempt to restrict access to these bottleneck facilities. In any event, however, ILEC facilities meet the definition of "network element" as long as the CLEC will use the facility to provide a telecommunications service.

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[56] Section 251(d)(2) sets forth a "necessary" and "impair" test that applies to proprietary and non-proprietary network elements, respectively, to determine whether an element must be made available to competing carriers. 47 U.S.C. § 251(d)(2). Based on these tests, the Commission has identified several key network elements that must be made available to competing carriers, including loops and interoffice transmission facilities. The loop UNE includes high-capacity lines, dark fiber, line conditioning, and some inside wire. The interoffice transmission facilities include dedicated transport from DS1 to OC96 and higher capacity levels. Loop and interoffice transmission facilities, as well as other UNEs, are key network components used to provide the transmission path that is necessary for competing telecommunications carriers and ISPs to offer their information services. *In Re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Notice of Proposed Rulemaking, (2001) ("*Triennial UNE Review*") (citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 3696, 3721 (1999) ("*UNE Remand Order*")).

[57] 47 C.F.R. § 251(c)(3) (emphasis added).

[58] 47 U.S.C. § 153(29) (emphasis added).

[59] See Section IV.B supra.

V. CONTRARY TO ILEC CLAIMS, ILECS MAY COMPETE INTERMODALLY AS COMMON CARRIERS SUBJECT TO TITLE II

ILECs, in an attempt to persuade policy makers to relive them of all regulatory obligations, have recently conducted public policy initiatives before Congress and this Commission claiming that because of intermodel competition from cable operators, they must be relieved of the obligations to permit access by intramodal competitors to the broadband capability of their networks. Indeed, it is likely that ILEC comments in this proceeding will continue the ILECs' efforts initiated prior to issuance of the *NPRM*, to urge the Commission to define their broadband network capability as subject only to Title I.[60]

Contrary to the bleak picture the ILECs are trying to present to the Commission, the fact is that ILECs are fully able to compete intermodally as common carriers subject to Title II. Under the Commissions' current regulatory regime, ILECs are able to provide Internet access and other information services including video programming as customers of their own common carrier services. In fact, as stated previously, ILECs have been particularly successful in rolling out DSL service, in many markets a direct competitor to broadband offerings by the cable companies with whom ILECs claim they cannot compete. ILECs provide 93% of intramodal broadband Internet access and nearly half of intermodal broadband Internet access. These figures by themselves completely refute ILEC claims that their Title II regulation impedes their ability to compete intermodally in the broadband marketplace. Consequently, ILECs' arguments that they should be relieved of their Title II obligations in order to permit intermodal competition is a naked attempt to mislead policy makers into legitimizing the ILECs' goal of being permitted

[60] See Letter from William Barr, Verizon, to Michael K. Powell, Chairman, Federal Communications Commission (Jan. 9, 2002), cited at *NPRM* fn. 61.

to engage in systematic discrimination against their competitors. The Commission should not give ILECs this satisfaction and should retain Title II regulation of ILEC provision of broadband services.

VI. TITLE II REGULATION OF THE TRANSMISSION COMPONENT OF WIRELINE BROADBAND INTERNET ACCESS IS IN THE PUBLIC INTEREST

A. Classification of the Transmission Component of Wireline Broadband Internet Access As a Telecommunications Service Is Essential to Implementation of National Security, Privacy, and Consumer Protection Statutes

As discussed below, the Commission's tentative conclusion that broadband Internet access service is an information service with a telecommunications component[61] would thwart achievement of important national security, network reliability, and consumer protection goals.

1. CALEA

The Communications Assistance for Law Enforcement Act or "CALEA" requires that all telecommunications carriers' equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications be capable of meeting specific law enforcement assistance capability requirements.[62] CALEA defines telecommunications carriers as "person[s] or entit[ies] engaged in the transmission or switching of wire or electronic communications as a common carrier for hire."[63] The definition of telecommunications carrier under CALEA excludes "persons or entities insofar as they are engaged in providing information services. . . ."[64] In light of these statutory definitions, the

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61 *See NPRM*, at ¶ 54.

62 *See generally*,47 U.S.C. § 101, *et. seq.*.

63 47 U.S.C. § 1001(8).

64 *See* 47 USC §1002(b)(2)(A).

Commission has determined that facilities used solely to provide an information service are not subject to CALEA whether the services are offered by an exclusive information service provider or by a common carrier that has established a dedicated information system apart from its telecommunications systems.[65] Consequently, if the Commission were to determine in this proceeding that the provision of broadband Internet access service is an "information service" as opposed to a telecommunications service, CALEA would not apply to the provision of broadband Internet access service by telecommunications service providers or any other services provided over the broadband facility including local dial tone. While it is not realistic to expect that all ILECs will build separate Internet access facilities, categorizing broadband Internet access as an information service could nonetheless undermine CALEA and would certainly complicate CALEA compliance.

Moreover, given the broad scope of CALEA, it is highly unlikely that Congress intended the broadband capability of the telephone network to be categorically excluded from CALEA, particularly in light of the increasing presence and use of broadband capability in the industry. The Commission can avoid this potential undermining of Congressional intent by determining that wireline broadband Internet access is at least in part a telecommunications service. Such a determination would assure that the goals of CALEA are met and that law enforcement agencies have the necessary tools to carry out their duty as the public switched network evolves towards a more advanced broadband capability.

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[65] *See Communications Assistance for Law Enforcement Act*, Further Notice of Proposed Rule Making, 13 FCC Rcd 22632, at ¶ 68 (1998).

2. Network Reliability and Interconnectivity

Section 256 of the Act directs the Commission to "establish procedures for . . . oversight of coordinated network planning by telecommunications carriers and other *providers of telecommunications services* for the effective and efficient interconnection of public telecommunications networks used to *provide telecommunications services*."[66] In enacting Section 256, Congress intended to preserve interconnectivity of the public telecommunications network; however, Congress limited the Commission's authority to oversee and coordinate network planning to telecommunications carriers and other providers of telecommunications services.[67] Consequently, if the Commission were to determine that broadband Internet access services are information services, the Commission would eliminate its ability to coordinate network planning and interconnectivity with respect to these services. Congress could not have intended for Section 256 to only apply to provision of narrowband telephone service. Accordingly, the Commission should classify the transmission component of wireline broadband Internet access as a telecommunications service in order to retain its ability to oversee broadband interconnectivity as Congress intended.

3. Discontinuance of Service

Section 214 of the Communications Act limits the ability of telecommunications carriers to unilaterally discontinue telecommunications service. If the Commission were to find that facilities-based wireline broadband Internet access service is exclusively an information service, providers of that service would be freed from the requirements of Section 214 and would be able to discontinue service without regard to those restrictions. While the Commission notes that

66 47 U.S.C. Sec. 256 (b) (emphasis added).

discontinuance applications are routinely granted,[68] the Commission's rules contain important consumer protection measures including a requirement to provide customer notice and an opportunity for users to appeal to the Commission if the discontinuance will cause unanticipated harm to their business or the customers they serve. In addition, the Commission has recently heightened its review of discontinuance applications,[69] which will likely increase the importance of the Commission's discontinuance rules. The increasing reliance of consumers and businesses on broadband Internet connectivity, and the evolution of the network toward integration with the Internet, requires that the Commission maintain it regulatory oversight over the transmission component of wireline broadband Internet access service. Accordingly, in order to ensure that discontinuances of service do not unduly harm the public interest, the Commission should determine that the telecommunications component of broadband Internet access service is an offering of telecommunications service subject to Title II obligations.

4. Customer Proprietary Network Information

In order to safeguard consumer's privacy, Section 222(c)(1) of the Act limits telecommunications carriers' dissemination of customer proprietary network information ("CPNI") derived from the provision of telecommunications services.[70] Specifically, Section 222(c)(1) provides that the privacy protection requirements of that section apply to CPNI gained

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67 *See* 47 U.S.C. § 256(b).

68 *See Broadband NPRM*, at ¶ 57, n.99.

69 *Reminder to Common Carriers Regarding Discontinuance of Domestic Service Under Section 214 of the Communications Act*, Public Notice, DA 01-1173, released May 8, 2001; *Requirements for Carriers to Obtain Authority Before Discontinuing Service in Emergencies*, Public Notice, DA 01-1257, released May 22, 2001.

70 *See* 47 U.S.C. § 222(a).

by a carrier "by virtue of its provision of a telecommunications service … "[71]Therefore, if the Commission classifies wireline broadband Internet access service exclusively as an information service, CPNI gained by virtue of provision of such service will not be subject to the protections of Section 222. Congress could not have intended this result because under the current regulatory framework ILECs are required to provide Internet access service as customers of their own tariffed telecommunications services and thus are subject to Section 222 with respect to the information services they provide using those tariffed services. Therefore, in order to maintain the protection of consumers privacy rights under Section 222, the Commission should classify the provision of wireline broadband Internet access services as in part a telecommunications service.

5. Access by Persons with Disabilities

Classifying wireline broadband Internet access as an information service would also eliminate the protections contained in the Act intended to ensure that persons with disabilities are able to access and use telecommunications services. Section 255 of the Act states that " *a provider of telecommunications service* shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable."[72] Persons with disabilities would be excluded from the protections of Section 255 for wireline broadband Internet access services if the Commission classifies those services as exclusively an information service. Congress could not have intended this result. Therefore, the Commission should define wireline broadband

71 *See* 47 U.S.C. § 222(a) (emphasis added).

72 47 U.S.C. § 255 (c) (emphasis added).

Internet access as being comprised in part of an Internet access service in order to preserve access by persons with disabilities to the Internet.

6. Intermodal Competition Will Not Adequately Safeguard Consumers

The Commission also seeks comment generally on whether the consumer protections of the Act are necessary with respect to broadband Internet access services in light of the differences in the market structure between analog voice services and broadband Internet access services.[73] Specifically, the Commission refers to the fact that intermodal competition among multiple broadband platforms may eliminate the need for consumer protection regulations in the broadband Internet access services marketplace. The Joint Commenters submit that it is far too soon to know whether, and how, intermodal competition will develop in the broadband Internet access services marketplace. As of August 2000, only 4.4 percent of U.S. households had subscribed to broadband Internet access.[74] A less than 5% penetration rate for broadband Internet access services is too low to extrapolate any useful data about what the larger market will eventually look like. Further, the wireline broadband Internet access market is currently not dominated by many competitors, but by two: cable and DSL providers, both of which have been raising the prices. In many geographic areas, broadband Internet access will likely be dominated by a single provider for the foreseeable future due to the tremendous economic advantages that the "first mover" has in the deployment of facilities that support such services. For these reasons, there is no basis for the Commission to conclude that intermodal competition has

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[73] *See NPRM*, at ¶ 60.

[74] *See Falling Through the Net: Toward Digital Inclusion*, National Telecommunications and Information Administration, at p. 101 (Oct. 2000).

obviated the need for consumer protection provisions that would be undermined by a determination that wireline broadband Internet access is exclusively an information service.

B. Classification of the Transmission Component of Wireline Broadband Internet Access As a Telecommunications Service Is Necessary to Ensure Continued State Authority Over Such Service

The Commission seeks comment on how classification of wireline broadband Internet access service as exclusively an information service would impact the balance of federal and state responsibilities over the network, particularly in light of the fact that the Commission has found that xDSL transmission used to provide Internet access services are subject to Commission jurisdiction.[75] A determination by the Commission that ILEC broadband capability is, in fact, not subject to common carrier regulation because it is used exclusively to provide an information service could have profound impacts on the ability of states to regulate broadband services.

Under the Act, states exercise authority over intrastate telecommunications service which they regulate as common carriage. The Act provides that "nothing in this Act shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices services, facilities, or regulations for or in connection with intrastate communication service . . ."[76] States play an important role in the regulation of wireline broadband Internet access and protecting consumer interests. The California Public Utility Commission, in considering a complaint alleging discriminatory treatment by SBC in the provision of DSL transport services, recently found that it had concurrent jurisdiction with the Commission over

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75 *See NPRM*, at ¶ 62.

76 47 U.S.C. § 152(2)(b).

the provision of xDSL Internet access services.[77] Other states have also been active in assuring nondiscriminatory access to ILEC broadband capability. For example, after SBC announced in October 1999 its $6 billion Project Pronto initiative to extend new fiber-fed loop facilities to millions of end-users, the Illinois Commerce Commission ("ICC") became the first state commission to order the unbundling of the fiber-fed loop architecture. The ICC's February 2001 decision established four new UNEs[78], and since that time the Tennessee Regulatory Authority and the Wisconsin Public Service Commission have also ordered unbundling of the fiber-fed loop.[79] In the course of the ICC deliberations, Ed Whitacre, Chairman and CEO of SBC, stated in a letter to Speaker Hastert and other Illinois legislators that the ICC's decision would make it "economically impossible" for SBC to deploy Project Pronto in the state. The letter warned that, because of SBC's decision to halt Project Pronto in Illinois, the affected consumers "cannot now, and may never, have access to DSL."[80] Commissioner Harvill poignantly noted that the very fact

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[77] *See California ISP Assoct'n v. Pacific Bell Tel. Co. and SBC Advanced Solutions, Inc.*, Case 01-07-027, California Public Utilities Commission, Assigned Commissioner's and ALJ's Ruling Denying Defendants' Motion to Dismiss (rel. Mar. 28, 2002).

[78] The ICC established four separate UNEs: (1) the subloop from the customer to the line card; (2) the line card itself; (3) the subloop from the line card to the OCD, and; (4) a port on the OCD. The decision also guarantees the right of CLECs to collocate their own line cards in SWBT's channel bank at the remote terminal. *See Arbitration Decision on Rehearing, In the Matter of Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Amendment for Line Sharing to the Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, and for an Expedited Arbitration Award on Certain Core Issues, et al., Illinois Commerce Commission,* Docket Nos. 00-0312 and 00-0313, Illinois Commerce Commission (Feb. 15, 2001) and Order (Mar. 14, 2001).

[79] The ICC established four separate UNEs: (1) the subloop from the customer to the line card; (2) the line card itself; (3) the subloop from the line card to the OCD, and; (4) a port on the OCD. The decision also guarantees the right of CLECs to collocate their own line cards in SWBT's channel bank at the remote terminal.

[80] Letter from Ed Whitacre, Chairman and Chief Executive Officer, SBC Communications, Inc., to the Honorable J. Dennis Hastert, U.S. House of Representatives 1 (Mar. 14, 2001) http://www.icc.state.il.us/icc/tc/cond29.asp SBC has subsequently indicated that it "is planning a limited and measured deployment of DSL-capable Project Pronto facilities." *See* Rebuttal Testimony of Carol A. Chapman, Ameritech Illinois Exhibit 3.1 at n. 42, Investigation Concerning Illinois Bell Telephone Company's Compliance with Section 271 of the Telecommunications Act of 1996, ICC Docket No. 01-0662.

that SBC's threatened halt to Project Pronto could mean that some consumers would never have access to DSL demonstrated precisely SBC's dominance of the market and therefore why it was important for the ICC to enforce aggressively SBC's unbundling obligations.

Contrary to the *GTE Order,*[81] states have concurrent jurisdiction over the provision of xDSL services used to provide Internet access services. In order to displace state regulation, congressional intent must be "clear and manifest."[82] Similarly, federal preemption of state regulation "must be clear and occurs only in limited circumstances."[83] Under Section 2(b) of the Act, Congress left the states with substantial authority to regulate intrastate services so long as state regulation does not conflict with the Commission's authority over interstate communications. In order to ensure the preservation of state authority over ILEC intrastate broadband services, the Commission should define wireline broadband Internet access service as a telecommunications service.

C. ILECs Can Best Serve the Public Interest By Participating in the Broadband Marketplace As Common Carriers

A Commission determination that some or all of the broadband capability that ILECs use to provide Internet access is subject only to Title I, would mean that this capability would not longer be subject to common carrier obligations. However, it is the unique status of ILECs as common carriers that enables them to best contribute to the public interest. If the Commission removes ILEC broadband access services from Title II regulation, CLECs and other competitors will be unable to obtain access to those facilities to provide competitive services to consumers,

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81 *See GTE Telephone Operating Cos.*, CC Docket No. 98-79, Memorandum Opinion and Order, FCC 98-292 (rel. Oct. 30, 1998) ("*GTE Order"*).

82 *See Jones v. Rath Packing*, 430 U.S. 519, 525 (1977).

83 *See Communications Systems Int'l v. Cal. Pub. Utils. Comm'n*, 196 F.3d 1011, 1017 (9th Cir. 1999).

which will undermine the goal of the Act to promote competition. In addition, as noted in these comments, ISPs do not have open access to other platforms providing broadband services, such as cable modem, satellite or wireless access, as the platforms over which these services are provided are not generally commercially accessible to unaffiliated ISPs. Nor is there currently any regulatory mandate that requires these providers to open up their platforms to competing ISPs. ILECs participation in the broadband marketplace as common carriers promotes access by consumers and businesses to a wide range of information sources, which in turn, promotes the development and deployment of greater and more innovative services. Accordingly, the Commission should require that ILECs offer broadband capability subject to common carrier obligations.

VII. THE COMMISSION SHOULD RETAIN *COMPUTER III* SAFEGUARDS INCLUDING THE REQUIREMENT THAT LECS OFFER SEPARATELY THE TRANSMISSION COMPONENT OF WIRELINE BROADBAND INTERNET ACCESS SERVICE

A. The *Computer Inquiry* Safeguards Are Not Obsolete In a Broadband Environment

The Commission suggests in the *NPRM* that the *Computer Inquiry* requirements may no longer apply to broadband access services because the restrictions imposed in the *Computer Inquiry* proceedings were initiated "at a time when very different legal, technological and market circumstances presented themselves to the Commission" and addressed services "more akin to voice mail and other narrowband applications," rather than broadband services.[84] Consequently, the Commission suggests that perhaps the *Computer Inquiry* safeguards should be limited to

[84] *NPRM* at paras. 31, 35-37.

narrowband technologies,[85] and seeks comment on whether the *Computer Inquiry* requirements should be modified or eliminated for facilities-based wireline broadband internet access services.[86] Contrary to the suggestion in the *NPRM*, the safeguards established in the *Computer Inquiry* proceedings are as applicable to, and necessary for, broadband Internet access services now as they were when the Commission first implemented them. While it is true that there have been tremendous technological advances associated with the provision of enhanced services since the creation of the basic/enhanced services dichotomy, the Commission recognized and took into consideration future technological advances for both basic and enhanced services when it established its basic and enhanced regulatory regime and corresponding safeguards.[87] Moreover, the legal, technological and market factors underlying the fundamental principles of the *Computer Inquiry* proceedings, upon which the safeguards are based, are equally valid today in the broadband services market. Thus, at a minimum, the existing *Computer Inquiry* safeguards must remain in place for broadband access services.

The Commission's initiation of the *Computer Inquiry* proceedings arose from the realization that the traditional telephone network was no longer limited to providing plain old telephone services and that technological evolution allowed the provision of computer and data

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85 *NPRM* at 36-37.

86 *NPRM* at para. 43.

87 *See In Re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, Final Decision and Order,* 28 F.C.C.2d, 268-69 (1971) *("Computer I")* (finding that data processing will be a major force in the economy "in both absolute and relative terms in the years ahead"); *see also See Amendment of Section 64.702 of the Commission's Rules and Regulations, Final Decision,* 77 F.C.C.2d 384, 425 (1980) ("*Computer II*")(where the Commission refused to classify different categories of enhanced services because in "a market as vibrant as enhanced services" such a distinction "may miss important new developments").

processing (enhanced) services over these networks.[88] The Commission's *Computer Inquiry* proceedings focused on the degree of regulation that should apply to enhanced services and the basic services used to transmit them. The result was the creation of a basic/enhanced services dichotomy, in which the Commission separated the basic common carrier transmission services from the rapidly evolving enhanced services;[89] finding separate regulatory schemes for these services necessary to address the functional and competitive differences between them.[90]

The Commission's establishment of the basic/enhanced dichotomy evolved from advances in microprocessor technology that permitted data to be processed outside of a central location and at intermediate locations or even within customer premises equipment ("CPE").[91] Such "distributed processing," as it is known, requires data to be transmitted within or interconnected with the telecommunications network and is the fundamental basis for the establishment of the basic transmission service classification in *Computer II*. In *Computer II*, the Commission recognized that basic service can be offered utilizing different bandwidths, as well

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88 *See In Re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, 7 F.C.C.2d 11 (1966) ("*Computer I NOI*").

89 The Commission defined basic service as "the common carrier offering of transmission capacity for the movement of information," including, analog or digital transport of voice, data and video. *Id.* at 419. The Commission held that basic services provide "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer-supplied information." *Id.* at 420. The Commission defined "enhanced service" as a service that "combines basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." *Id.* at 387; *see also* 47 C.F.R. § 64.702(a). Following the passage of the 1996 Act, the Commission found that Congress intended to maintain the basic/enhanced distinction in its definitions of "telecommunications services" and "information services" and that "enhanced services" and "information services" were synonymous. *See Federal State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd 111501, 11516-17, 11520, 11524 (1998).

90 *Computer II,* 77 F.C.C.2d 384.

91 *Computer II* at 391-93.

as different analog and digital capabilities,[92] and made it clear that its basic service classification was not meant to restrict "a carrier's ability to take advantage of advances in technology in designing its telecommunications network."[93] The Commission also stated that "[u]se internal to the carrier's facility of communications techniques, bandwidth compression techniques, circuit switching, message or packet switching, error control techniques, etc. *that facilitate economical, reliable movement of information does not alter the nature of the basic services*." [94] Thus, the Commission's establishment of the basic services classification and associated regulation took into account the future technological potential of such services. Indeed "distributed processing" directly foreshadowed the Internet.

The Commission also took into consideration the future potential of enhanced services in establishing its *Computer Inquiry* framework. Indeed, the rapid evolution of technology in the enhanced services market was a key factor in the Commission's establishment of the basic/enhanced services dichotomy.[95] Specifically, the Commission found that the market for enhanced services was effectively competitive and that such services would "flourish best" in a competitive market and would provide the public with "a wider range of existing and new data processing services."[96] Thus, seeking to promote and foster this competition, the Commission held that enhanced services should not to be subject to Title II common carrier regulation.[97] The Commission stated that its decision in *Computer I* to forgo regulation of data processing was

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92 *Id.* at 419.

93 *Id.* at 420.

94 *Id.* at 420.

95 *See Computer II*, 77 F.C.C.2d at 433.

96 *Id.* at 433.

97 *Id.* at 423-33.

"largely accurate" and "[i]f anything, it was overly conservative as to the extent to which market applications of computer processing technology would evolve."[98] The Commission also confirmed its finding that "regulation of enhanced communications services would limit the kinds of services an unregulated vendor could offer, restricting this fast-moving, competitive market."[99] The Commission also noted that "the pressure on a set of administrative rules which fail to recognize the growth in operational sophistication demanded by our nation's economy will be inexorable."[100] Accordingly, it is clear the consideration of future technologies and services was a key component in the Commission's analysis when it established the basic/enhanced services distinction

Moreover, the key C*omputer Inquiry* safeguards, such as the unbundled offering of basic service, are not technology specific. They can, and do currently, apply equally to narrowband and broadband services. There is nothing in the key *Computer III* safeguards or framework that suggests they were intended only for the narrowband network. Accordingly, the policies and safeguards established in the basic/enhanced services regulatory regime also apply to broadband and future technologies and services.

Throughout the history of the *Computer Inquiry* proceedings, the primary purpose of the basic/enhanced service dichotomy and the need for the safeguards has been to address the reliance of the enhanced services on basic transmission services.[101] In the *Computer Inquiry*

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98 *Id.*

99 *Id.* at 434.

100 *Id.* at 422.

101 *Computer I*, 28 F.C.C. at 269. S*ee also Computer II*, 77 F.C.C.2d 384; and *Amendment of Section 64.702 of the Commission's Rules and Regulations, Report and Order*, 104 F.C.C.2d 958 (1986) ("*Computer III Phase I Order*").

proceeding, the Commission found that "enhanced services are dependent upon the common carrier offering of basic services and that a basic service is the 'building block' upon which enhanced services are offered."[102] The Commission consistently has determined that dominant facilities-based carriers providing both basic and enhanced services have an incentive to discriminate against competing enhanced service providers that seek to purchase the underlying transmission capacity from the dominant carriers.[103] Thus, to protect the competitive nature of enhanced services, the Commission retained Title II common carrier regulation of the basic transmission services used to provide these services.[104]

Based on these fundamental principles, the Commission has placed restrictions on facilities-based carriers providing both basic and enhanced services. Specifically, the Commission requires carriers that "'own common carrier transmission facilities and provide enhanced services [to] unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations.''[105] In order to further protect the competitive nature of enhanced services, the Commission also has imposed additional

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102 *Id.*

103 *See In Re Policy and Rules Concerning the Interstate, Interexchange Marketplace, Report and Order*, 16 FCC Rcd. 7418, 7420 (2001)("*CPE/Enhanced Services Unbundling Order")*.

104 *Id.* at 428.

105 *CPE/Enhanced Services Unbundling Order*, 16 FCC Rcd. at 7421 (citing *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling and American Telephone and Telegraph Company Petition for Declaratory Ruling, Memorandum Opinion and Order*, 10 FCC Rcd. 13717, 13719 (1995); and *Competition in the Interstate Interexchange Marketplace*, CC docket No. 90-132, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd. 4562, 4580 (1995).

safeguards on the RBOCs, including the Comparably Efficient Interconnection ("CEI"), Open Network Architecture ("ONA"), cost allocation and network disclosure requirements.[106]

Changes in technology may have improved transmission speeds and allowed the transfer and use of more sophisticated data and broadband services, but broadband providers still rely on basic transmission services interconnected with the telecommunications network to provide these broadband services. Indeed, in recognition of this fact, the Commission has continued to apply the *Computer Inquiry* safeguards to new technologies, including high-speed, packet-switching services.[107] As the Commission found in its *Frame Relay Order*, treating the high-speed, packet-switching frame relay service as a basic service "provides competitive access to the underlying basic service of facilities-based carriers who are often better able to implement new communications technologies. This access allows competing enhanced service providers to more easily enter and compete in the market for such technologies."[108] Although the Commission has, during the course of its *Computer Inquiry* proceedings, modified the level of restrictions governing the provision of basic and enhanced services,[109] it has not eliminated the requirement that the basic transmission component be separated from the enhanced service. In

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106 Later, after finding that the Section 251(c)(5) network disclosure rules of the 1996 Act were as at least as comprehensive as the *Computer III* disclosure rules, the Commission eliminated the latter rules. *Computer III Further Remand Order*, 14 Commission Rcd. at 4316-17. In addition to these requirements, the RBOCs also are subject to the Commission's cost-accounting rules to prevent cross-subsidization between the regulated transmission services and the unregulated enhanced services. See 47 C.F.R. Parts 31, 43, 67 and 69.

107 *See Frame Relay Order*, 10 FCC Rcd. 13,717.

108 *Id.* at 13722.

109 In its *Computer II* proceeding, the Commission required the dominant RBOCs to establish a separate subsidiary for the provision of enhanced services, which was required to purchase its transmission capacity from the parent company's tariff. *Computer II*, 77 F.C.C.2d 384. In its *Computer III* proceeding, the Commission eliminated the separate subsidiary requirement and replaced it with non-structural safeguards including the CEI and ONA requirements. *Computer III, Phase I Order*, 104 F.C.C.2d 958. Currently, the RBOC are permitted to provide bundled basic and enhanced services, but only subject to the restrictions and safeguards associated with providing these services, including non-discriminatory access to the underlying transmission services.

addition, after more than 30 years of addressing this issue, and even more significantly, since passage of the 1996 Act, the Commission, in a decision released only a year ago, found that the underlying transmission service used to provide information services is still a critical input for enhanced service providers,[110] and currently is applying these safeguards to the BOCs' provision of broadband services.[111]

The Commission's own policies established in its *Computer Inquiry* proceedings recognize that technological distinctions in services are irrelevant to basic/enhanced services regulation if dominant control over the facilities essential to provide these services still exists. As discussed herein,[112] the RBOCs still are dominant in the local exchange market and still control essential bottleneck facilities used to provide broadband services. Thus, the fundamental principles of dominant control over transmission facilities and the potential for discrimination that originally served as the basis for the establishment of the *Computer Inquiry* policies and safeguards[113]still apply today and require that these anti-discrimination safeguards remain in place for broadband access services.

The *NPRM* also suggests that the pro-competitive and deregulatory policies of the 1996 Act that are aimed at the development of the Internet and deployment of advanced services may be different than those considered by the Commission in the *Computer Inquiry* proceedings.[114]

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110 *Id.* Indeed, the Commission found the transmission component so critical element it that it imposed the separation requirements on non-dominant carriers. *Id.* at 7442-43.

111 *CPE/Enhanced Services Unbundling Order*, 16 FCC Rcd. At 7425.

112 S*upra* Section III. B, *supra*.

113 *See Computer II*, 77 F.C.C.2d at 422 (noting that as "the market applications of computer technology increase, communications capacity has become the necessary link allowing the technology to function more efficiently and more productively").

114 *NPRM* para. 35, n. 69.

Contrary to the Commission's suggestion, however, the statutory mandate underlying the *Computer Inquiry* policies is consistent with the 1996 Act's mandate governing broadband access services. In *Computer I*, the Commission cites its mandate under Section 151 of the Act "to make available 'to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges . . . .'"[115] as the basis for its *Computer Inquiry* rules. In the *NPRM*, the Commission cites its mandate under Section 706 to encourage "'the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . .'" as the basis for its regulation of broadband access services.[116] As is evident in the language of both of these provisions, the Commission's goal under both statutory provisions is similar—to establish rules and policies that will make communications and advanced telecommunications available to all Americans. It follows then that the Commission's pro-competitive policies governing enhanced services established in the *Computer Inquiry* proceedings are consistent with the pro-competitive policies set forth in the 1996 Act. Indeed, nearly 30 years ago, the Commission found the enhanced services market truly competitive, stating that "regulation of enhanced communications services would limit the kinds of services an unregulated vendor could offer, restricting this fast-moving, competitive market."[117] At the same time, however, the Commission recognized that the transmission component underlying the provision of enhanced services was owned and controlled by dominant carriers seeking to compete directly with the enhanced service

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115 *Computer I*, 28 F.C.C.2d at 268 (citing 47 U.S.C. § 151).

116 *NPRM* at n.69 (citing 47 U.S.C. § 157).

117 *Computer II*, 77 F.C.C.2d at 433-34.

providers—a critical factor that had the potential to threaten this competitive market.[118] As noted in these Comments, this same concern exists in the broadband access services market today, and therefore, the same policies must apply.

Throughout the current history of the *Computer Inquiry* proceedings, the Commission has adapted its regulations to the changes in the enhanced services market and modified its restrictions and safeguards, accordingly. Nonetheless, the Commission has always found, even as recent as a year ago, that the continued dominance of the ILECs in the local market warrants continued application of the *Computer Inquiry* safeguards. Market conditions for broadband internet access services have not changed so dramatically in the last year as to justify such a radical departure in the Commission's regulations aimed at protecting ISPs from discrimination as elimination of the *Computer Inquiry* safeguards. Indeed, it is significant to note that, in assessing the impact of the pro-competitive requirements of the 1996 Act on the *Computer Inquiry* safeguards, the Commission stated that "[a]lthough many ISPs compete against one another, each ISP must obtain the underlying basic services from the incumbent local exchange carrier, often still a BOC, to reach its customers. Although . . . under the 1996 Act, the BOCs are subject to additional statutory requirements, such as the section 251 unbundling and the network information disclosure requirements . . . we cannot yet conclude that the pro-competitive goals of the 1996 Act have been fully reached."[119] The basis for the Commission's retention of its *Computer Inquiry* safeguards then exist still today, and, for the same reasons, the Commission should retain existing competitive safeguards.

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118 *Id.* at 475.

119 *See In Re Computer III Further Remand Proceedings*, 14 FCC Rcd. 4289, 4301 (1999) ("*Computer III Further Remand*") (refusing to remove the safeguards established to protect ISPs from discriminatory treatment).

In sum, there is nothing about wireline broadband Internet access services that justifies exempting these services from the fundamental principles governing common carrier regulation and protection against discrimination and anticompetitive behavior that lay at the heart of the *Computer Inquiry* policies and safeguards. Indeed, as demonstrated herein, these principles are just as critical today to promoting competition in the broadband access market as they were when the Commission began its *Computer Inquiry* proceeding. Information service providers must compete still with dominant ILECs in the provision of broadband Internet access services. The ILECs still are dominant carriers in the local exchange and exchange access markets and have an incentive to discriminate against their competitors in the provision of broadband access services. Thus, there is no legal, regulatory, or market distinction that supports the elimination of the *Computer Inquiry* safeguards with respect to broadband access services.

B. Performance Standards and Section 271 Compliance Are Not Adequate Substitutes for *Computer Inquiry* Safeguards

The Commission seeks comment on whether the assessment of certain performance standards on the RBOCs' provision of narrowband services would be sufficient to alleviate the need for the *Computer Inquiry* safeguards.[120] The Commission also seeks comment on whether Section 271 compliance for entry into the long distance market would be an adequate substitute for the *Computer Inquiry* safeguards in the RBOCs' provision of broadband services.[121] Neither the imposition of performance standards, nor compliance with the Section 271 requirements is a sufficient substitute for the *Computer Inquiry* safeguards, which are necessary to protect against discrimination by the RBOCs in the provision of broadband access services.

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120 *NPRM* at para. 48.

121 *Id.*

The Commission's suggestion that the *Computer Inquiry* requirements may be unnecessary for the RBOCs' broadband services if the RBOCs are achieving certain performance levels with respect to its narrowband services, is based on erroneous presumption that there should or could be disparate regulatory treatment for RBOCs' narrowband and broadband services. As explained above, there is no legal, technical or market-related distinction that would warrant the elimination of the *Computer Inquiry* safeguards with respect to the RBOCs' provision of wireline broadband Internet access services.

Moreover, the establishment of performance measures on the RBOCs' delivery of non-broadband services is irrelevant to whether the safeguards are necessary to protect against discrimination with respect to the RBOCs' use of bottleneck facilities to deliver broadband services. Simply because an RBOC is meeting minimum performance standards in its provision of narrowband services does not mean that the RBOC is not engaging in systematic discrimination in its provision of broadband services. This is especially true if there are no safeguards in place to protect competing broadband providers against discrimination from RBOCs that control facilities necessary to provide competing broadband services. However, broadband performance standards could usefully supplement existing C*omputer III* safeguards, and the Commission should consider adopting them.

Section 271 requirements also are not an adequate substitute for *Computer Inquiry* safeguards because they do not address the specific concerns underlying the need for the safeguards. As an initial matter, the Section 271 requirements are only applicable to RBOCs that choose to provide long distance service. As such, they would not serve to prevent discrimination in broadband services by an RBOC that has not chosen to provide in-region long distance service. Moreover, the Section 271 14-point competitive checklist focuses on interconnection

and access to the RBOC's network facilities, including access to UNEs and unbundled local loop by CLECs,[122] which, if the Commission classifies broadband access as exclusively an information service, may not include facilities used to provide those services. Thus, the Section 271 requirements fail to ensure that competitors to the RBOCs will be granted non-discriminatory access to the basic transmission services necessary to provide their broadband services.[123] In particular, unlike the *Computer Inquiry* safeguards, Section 271 does not specifically require the RBOCs providing bundled basic and information services to separate the basic transmission services underlying the provision of broadband services and to make this transmission service available to competing broadband service providers. Applying the *Computer Inquiry* safeguards to broadband internet access services, however, would ensure such non-discriminatory access.

Moreover, under Section 271 the RBOCs need only meet a minimum level of performance that is assessed on the "totality of the circumstances."[124] Such an aggregate assessment provides no guarantee that an RBOC has met the required performance level with respect to all competitive carriers seeking access to its network facilities or even with respect to each element on the 14-point checklist. In addition, there is no guarantee that an RBOC will maintain those performance levels after it receives Section 271 approval, as evidenced by the fact that Verizon paid $3.5 million in Performance Assurance Plan penalties for December 2000

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122 *Id.*

123 As noted above in a recent *Computer Inquiry* decision, the Commission found that notwithstanding the additional regulatory protections put in place by the 1996 Act, the *Computer Inquiry* safeguards were still necessary to protect enhanced service providers from discrimination. *See Computer III Further Remand* 14 FCC Rcd. At 4301.

and $3.8 million for January 2001 for failure to meet post-review performance standards.[125] Therefore, RBOC compliance with the Section 271 requirements is an inadequate substitute for the *Computer Inquiry* safeguards.

C. The Existence of Intermodal Competition Is Irrelevant to Whether ILEC Safeguards are Necessary to Protect Against Discrimination

In *NPRM*, the Commission suggests that because the "core assumption underlying the *Computer Inquiries* was that the telephone network is the primary, if not exclusive, means through which ISPs can obtain access to customers"[126] the *Computer Inquiry* safeguards may no longer be necessary to protect against ILEC discrimination because there are other network platforms, such as cable, wireless and satellite, over which customers can access broadband services.[127] Contrary to the Commission's suggestion, however, intermodal competition, such as it is, does obviate the need for *Computer Inquiry* safeguards.

While *end-user customers* may have access to a variety of different platforms for receiving broadband services, including cable modem service, *information service providers* and other broadband competitors to ILECs do not have ready access to such platforms for the provision of their services to their customers. First, cable companies are regulated under Title VI, not Title II of the Act, and thus are not required to open their underlying transmission facilities to ISPs insofar as they are providing cable service. Indeed, with respect to cable

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124 *See In Re Joint Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Long Distance for the Provision of In-Region, InterLATA Services in Kansas and Oklahoma,* 16 FCC Rcd. 6237, para. 29 (2001).

125 *See* Verizon New York PFAP/CCAP Market Adjustment summary, December 2000 and January 2001. http://238.11.40.241/east/wholesale/resources/res_ny_perf_assur_plan_results.htm

126 *NPRM* at para. 36.

127 *Id.*

modem services, the Commission recently found that cable modem service does not include an offering of telecommunications services to the public.[128] The Commission also found that the *Computer II* requirements governing the unbundling of transmission facilities do not apply to cable operators providing cable modem services, and even if they did, the Commission waived the requirements on its own motion.[129] Even though a few cable operators are providing transmission services to unaffiliated ISPs by choice[130] or pursuant to a government decree,[131] this access is extremely limited and only available to a few ISPs and not available at all to other broadband providers. Moreover, differences between their respective customer bases render cable modem services, which focuses primarily on residential customers, an inadequate substitute for ISPs targeting business customers.[132]

In addition, other broadband access platforms, such as wireless and satellite, are not only still in their infancy, but, like cable, are not regulated as Title II common carriers. As a result, access to these transmission services also are not readily available to ISPs. Thus, as explained herein,[133] the transmission facilities of dominant facilities-based common carriers still are the primary, if not exclusive, means through which ISPs can obtain access to customers. If *Computer Inquiry* safeguards are not in place, the ILECs will not be required to provide competitors with

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128 *See In Re Inquiry Concerning High-Speed access to the Internet over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking,* GN Docket No. 00-185, FCC 02-77 at paras. 45-47, 95 (rel. Mar. 15, 2002).

129 *Id.* at paras. 43-45.

130 *See* Comcast Corp, *Comcast and United Online to Offer NetZero and Juno High-Speed Internet Service* (press release), Feb. 26, 2002).

131 *See* FTC AOL Time Warner Merger Order, Federal Trade Commission, Docket No. C-3989, File No. 001 0105, §§ II, III (December 14, 2000).

132 In any event, if the only ISPs in the market are those affiliated with the ILEC and cable providers, then the Internet products available to consumers will be diminished in quality and quantity as a result of the lack of competition.

the transmission capacity needed to provide their services to their customers. Even if the ILECs were to provide such services, without the safeguards in place, there would be no assurances that such services would be provided on a non-discriminatory basis and under the same terms and conditions that the ILECs obtain to provide their own enhanced services. As a result, competitors of the ILECs would effectively be cut off from providing wireline broadband internet access services, especially where intermodal competition between delivery platforms has a diminutive ameliorating effect on the ability of ISPs to reach their customers. Accordingly, intermodal competition does not reduce the need for application of Title II safeguards to LECs.

D. The *Computer Inquiry* Safeguards Create the Right Incentives to Encourage Deployment of Broadband

It is not necessary for the Commission to remove the *Computer Inquiry* safeguards in order to encourage further deployment of broadband services. To the contrary, if the Commission were to eliminate these safeguards, it would have a detrimental impact on the deployment of broadband services.

As the Commission recently found, the deployment of advanced services to all Americans is proceeding in a "timely and reasonable manner," and the advanced services market "continues to grow." This growth is occurring even with the current *Computer Inquiry* safeguards in place. Facilities-based CLECs entering the market are investing in and constructing fiber optic networks designed to meet the high-speed data needs of today's consumers. In response to this competitive challenge, the ILECs also have been investing in and upgrading their networks for the provision of advanced high-speed services despite the common carrier regulations imposed on the provision of their services.

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As discussed in these comments, the *Computer II* regulatory framework was designed to promote and achieve a deregulated information services marketplace. That framework has succeeded in spectacular fashion as evidenced by the fact that the growth in the Internet and the associated increase in demand for telecommunications services has been a key growth factor for the United States economy and made the United States the world leader in telecommunications technology. However, this growth and success would not have occurred if safeguards, including the *Computer II* unbundling obligations, had not been in place to assure that RBOCs could not leverage their control of the local network into control of the information services marketplace. In short, the Commission's assertion of Title II authority and imposition of appropriate safeguards has strongly served the public interest and should remain in place.

It is an undisputed fact that it is competition that creates the incentive to invest in and deploy advanced technologies. The Commission has in its reports on the status of the deployment of advanced telecommunications that "'competition, not regulation, holds the key to stimulating further deployment.'" [134] The Commission also recognized that "there may be important legal, policy, technological, or other differences among classes of providers that require disparate regulatory treatment of such providers."[135] It is such a recognition of the fact that the dominant position of the ILECs requires special regulatory treatment that led to the creation of regulatory requirements, such as the *Computer Inquiry* safeguards, that protect and promote this competition. Without these safeguards, competition in the broadband market will be stymied and the ILECs will no longer have an incentive to invest in advanced technologies.

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134 *Advanced Telecommunications Third Report* at para. 133 (citing *Advanced Telecommunications Second Report*, 15 FCC Rcd. at 21004).

135 *Id.*

Indeed, the Commission noted in its *Frame Relay Order* that "under the *Computer II* and *Computer III* decisions, competitive access has promoted the public interest by accelerating the deployment of emerging technologies such as frame relay."[136] For these reasons, the *Computer Inquiry* safeguards create the correct incentive to promote competition in the broadband internet access services market, and, in turn, promote continued deployment of wireline broadband capability.

E. The Commission Should Preserve and Expand *Computer Inquiry* Safeguards

At a minimum, for the reasons stated above, the Commission should continue to apply the existing *Computer Inquiry* safeguards to the RBOCs with respect to their provision of broadband Internet access services. However, as documented in comments filed in the Commission's *Computer III Further Remand FNPRM*, and incorporated by the *NPRM* into this proceeding, the RBOCs have engaged in systematic anti-competitive and discriminatory behavior in the broadband services market despite the existing safeguards.[137] Accordingly, as suggested by commenters in response to the Commission's *Computer III Further Remand FNPRM*, the Commission should consider modifying existing safeguards and/or imposing additional requirements on the BOCs in the provision of broadband internet access services. Some suggested changes may include the following:[138]

- Require complete structural separation between RBOC wholesale and retail operations;
- Make all agreements between the RBOCs and their ISPs available to the public;

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136 *Frame Relay Order*, 10 FCC Rcd. at 13722.

137 *See* Initial Comments of the California ISP Association, Inc., CC Docket Nos. 95-20 and 98-10 (filed April 16, 2001).

138 *Id.* at 30-35.

- Impose reporting requirements to monitor RBOC compliance, including performance metrics regarding installation, repair and disconnection intervals;
- Enforce existing joint marketing safeguards and implement additional safeguards for ensuring equitable marketing opportunities;
- Require non-discriminatory access to RBOC ordering and billing systems; and
- Require ILECs that are providing DSL services permit CLECs to provide voice services over the same line the ILEC uses to provide such DSL services.

The RBOCs have demonstrated that they are able and willing to discriminate and engage in anti-competitive behavior in the provision of broadband access services. Therefore, it is essential not only that the Commission maintain the existing *Computer Inquiry* safeguards, but also consider modifying or establishing additional safeguards to protect competitors from such anti-competitive behavior and to ensure that competing ISPs have access to essential bottleneck transmission facilities and services on non-discriminatory terms and conditions.

VIII. DEREGULATION OF ILEC BROADBAND WIRELINE INTERNET ACCESS SERVICE IS NOT NECESSARY TO PROMOTE THE AVAILABILITY OF BROADBAND SERVICES

A. ILECs' Are Already Deploying a Broadband Capability

ILECs have already widely deployed a broadband capability, and are rapidly installing an even more robust broadband capability in their existing networks. For example, the following facts, most of which come from the ILECs themselves, show that they are increasing the deployment of a broadband capability notwithstanding Title II and other the regulatory obligations:

- BellSouth announced 25% growth in data revenues and a 189% increase in DSL subscribers in 2001, which BellSouth noted was "the fastest growth of any DSL or cable provider in the country."[139]
- BellSouth claimed that it had "the most aggressive DSL deployment strategy in the industry" and that it had increased its DSL coverage from 45% to 70% of households in 2001. [140]
- In its fourth quarter, year-end 2001 results report, Qwest stated that "DSL, wireless and Internet services continue to be key growth products."[141]
- Qwest's DSL customers at the end of 2001 represented a 74% increase from the end of 2000.[142]
- In a January 24, 2002, "Investor Briefing" SBC announced that it had expanded its DSL-capable footprint by 37% in 2001 and that it had the "industry's largest DSL Internet customer base."[143]
- SBC announced growth in its data services of between 14.4% and 27.9% in 2001 and 16.9% in the fourth quarter of 2001 for high-speed data transport services.[144]

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139 BellSouth investor news, "BellSouth Reports Fourth Quarter Earnings," http://www.bellsouth.com/investor/pdf/4q01p_news.pdf (Jan. 22, 2002).

140 Newsroom, "BellSouth Captures 620,500 DSL Customers and Deploys Broadband Capabilities to More than 15.5 Million Lines," http://bellsouthcorp.com/proactive/newsroom/release (Jan. 3, 2002).

141 "Qwest Communications Reports Fourth Quarter, Year-End 2001 Results," http://media.corporate-ir.net/media_files/NYS/q/q_1_28_02earnrel.htm (Jan. 29, 2002).

142 *Id.*

143 SBC Investor Briefing No. 228, http://www.sbc.com/investor_relations/financial_and_growth_profile /investor_briefings /1,5869,253,00.html, at 2 and 5 (Jan. 24, 2002) ("SBC Fourth Quarter Briefing").

144 SBC Second Quarter Briefing, at 4; SBC Third Quarter Briefing, at 4; SBC Fourth Quarter Briefing, at 4.

- Verizon reported a 122% increase in DSL subscribers and a 21.2% increase in data transport revenues in 2001.[145]
- By year-end 2001, Qwest had increased by 15% over year-end 2000 the number of its central offices equipped for DSL.[146]
- In 1999, SBC launched "Project Pronto," a $5 billion investment in high-speed broadband services to residential consumers.[147]
- SBC also continued expansion of its broadband network capabilities, with 25 million DSL-capable customer locations at year's end. In 2001, SBC's DSL-capable footprint expanded by more than 6.7 million customer locations, or 37 percent.[148]
- In June 2001, Verizon informed the New York Public Service Commission that the "unprecedented and unpredictable demand" for high-speed data circuits required increased capital spending and the deployment of new technologies.[149]
- Verizon also announced that it had deployed DSL to central offices serving 79% of Verizon's local access lines and that its total number of data circuits in service had increased 53% from 2000.[150]

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[145] "Verizon Communications Reports Solid Results For Fourth Quarter, Provides Outlook for 2002," http://investor.verizon.com/news/VZ/2002-01-31_X263602.html (Jan. 31, 2002).

[146] "Qwest Communications Reports Fourth Quarter, Year-End 2001 Results," http://media.corporate-ir.net/media_files/NYS/q/q_1_28_02earnrel.htm (Jan. 29, 2002).

[147] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, CC Docket No. 98-146, FCC 02-33, ¶ 70 (rel. Feb. 6, 2002) ("*Third Section 706 Report*").

[148] SBC-Investor Relations-Investor Briefings, "Revenue and Expense trends," http://www.sbc.com/investor_relations/financial_and_growth_profile/investor_briefings (March 20, 2002).

[149] *See*, Opinion and Order Modifying Special Services Guidelines for Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Reporting, Cases 00-C-2051 and 92-C-0665, Opinion No. 01-1, NYPSC, June 15, 2001, p. 10.

Obviously, these ILECs have deployed, and are continuing to deploy, broadband facilities, including fiber in the loop in spite of the Commission's determination that DSL and other broadband services are telecommunications services subject to common carrier regulation[151] and that advanced networks are fully subject to Section 251(c)(3) unbundling obligations.[152] Therefore, contrary to the selected pronouncements of ILECs' regulatory spokespersons, the ILECs actions reveal that regulatory obligations have not inhibited their investment in broadband infrastructure and deployment of broadband services.

B. Factors Other Than Regulation Fully Account for the Pace of Broadband Deployment

To the extent broadband is not being deployed quickly enough, which is not the case according to the Commission's *Advanced Services Reports*, this is attributable to factors other than common carrier regulation of broadband services. First, the phenomenon generally referred to as the lack of a "killer application" may account for a slower than anticipated broadband deployment. In other words, there are no services for which wireline broadband networks more advanced than those already in place are necessary. Video programming is available from several sources including over-the-air broadcast, cable, satellite, videocassettes and DVDs. High speed web browsing is already available through DSL and cable modem service, although these services are not necessarily substitutes for each other. Businesses have been able for years to

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150 News Release, "Verizon Communications Second Quarter Earnings Highlighted by Strong Long-Distance and Wireless Sales," http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=59168 (July 31, 2001).

151 *Deployment of Wireless Service Offering Advanced Telecommunication Capability* 13 FCC Rcd 24012, 24029, para. 35 (1998) (*"Advanced Service Order")*. *See also* Comments of PacBell, CC Docket No. 98-103, filed Sept. 11, 1998, p. 14 ("ADSL is clearly a 'telecommunications service' that will be used to originate and terminate interstate telecommunications.")

152 *Deployment of Wireline Service Offering Advanced Telecommunication Capability, 13 FCC Rcd 24011* (1998).

obtain the high-speed services they need from ILECs in the form of DS-1 and higher speed services. In short, futuristic ubiquitous wireline broadband networks have not been built because there is insufficient demand for them.

It was recently reported that the Administration, in a refreshing change from ILEC and other government views, has recognized that demand, not supply, is limiting the growth of broadband networks. [153] Though based on an assumption that broadband is not being deployed fast enough, which is not the case, this statement properly acknowledges that a shortage of broadband is not the issue. In addition, Glenn Hubbard, Chairman of the President's Council of Economic Advisors recently stated:

> "Many consumers don't yet see the value of broadband," he said, pointing to the fact that in Atlanta, [a] price point of zero still wasn't sufficient motivation for half of consumers. As far as Bush Administration is concerned, he said, policy decisions can have "bigger impact on the demand side …"[154]

Second, ubiquitous super advanced broadband networks have not been built because the technical solutions that might make them affordable have not yet been invented. Recent studies show that consumers are unwilling to pay more than $25.00/month for high speed access and that this explains why less than 5% of U.S. households subscribe to it.[155] The ILECs have dangled the politically appealing prospect of a type of super-broadband "passive optical network,"

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153 "Bush Administration Focuses on Increasing Demand for Broadband," Communications Daily, March 6, 2002, p. 3.

154 *Id.*

155 "Broadband Success Requires More than Regulatory Clearance, Says Research," CLEC News, February 21, 2002, http://www.c.ec-planet.com/news/02feb2002/18broadband.html

bringing fiber optics as close to consumers as possible[156] as a basis for deregulating broadband access. But given that studies funded by the ILECs themselves have estimated that the cost of deploying such gold-plated networks nationwide would be $270 billion to $416 billion,[157] it is clear that this type of network is not currently economically feasible.

Accordingly, even if the Commission were to comprehensively deregulate ILECs' participation in the broadband marketplace, there is no reason to believe that this would result in widespread deployment of more advanced broadband networks, simply because the costs thereof are more than consumers are willing to pay. In fact, even if ILEC broadband services were deregulated, ILECs would not likely build these futuristic networks unless costs drop dramatically or they are permitted to compel all ratepayers to pay for them through cross-subsidies and general rate increases.

Even the Commission has provided a non-regulation-based explanation for the recent slowdown in the pace of increased investment in broadband networks:

> " [I]ndustry investment in infrastructure to support high-speed and advanced services has increased dramatically since 1996. Analysts forecasted at that time that this upward trend would continue, spurred by the introduction of competition into the market. Although analysts still generally expect this trend to continue, they observe that there has been a recent slowdown in investment caused by the economic downturn generally and, more particularly, over-building by carriers, over-manufacturing by vendors, over-capitalization by financial markets, coupled with unrealistic market expectations by investors.[158]

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156 Communications Daily, February 26, 2002, at 4-5, describing *Building a Nationwide Broadband Network: Speeding Job Growth*, Telenomic Research, February 25, 2002.

157 *Id.*

158 *Third Section 706 Report* at ¶ 62 (footnotes omitted).

Therefore, there is no basis for the Commission to conclude in this proceeding that removal of common carrier regulation from ILEC broadband capability would promote its broadband goals.

C. ILECs Have Strong Incentives Not to Deploy Broadband

Despite the fact that only ILECs possess ubiquitous networks that can be used to provide services to consumers and businesses, they are not the best source of innovation in provision of services over those networks. In fact, ILECs are slow to roll out new services, and have strong incentives not to deploy, new, efficient services that will compete with, and cannibalize, existing services. As demonstrated by SBC's sluggish roll-out of a converged service package similar to that rolled out by CTC nearly a year and a half ago which could effectively result in a low cost service offering available to SBC consumers.

The ILECs' pattern of deployment of DSL capable networks illustrates perfectly that ILECs are not sources of innovation in provision of broadband services and instead prefer to maintain revenues from existing services. The fact is that ILECs ignored DSL and refused to begin deploying it until CLECs began doing so. As President Clinton's Council of Economic Advisers stated in early 1999:

> Although DSL technology has been available since the 1980s, only recently did [the ILECs] begin to offer DSL service to businesses and consumers seeking low-cost options for high-speed telecommunications. The incumbents' decision finally to offer DSL service followed closely the emergence of competitive pressure from … the entry of new direct competitors attempting to use the local-competition provisions of the Telecommunications Act of 1996 to provide DSL over the incumbents' facilities.[159]

[159] ALTS New Economy Analysis at 4 (citing Council of Economic Advisers, Economic Report of the President, February 1999, pp. 187-188, http://w3.access.gpo.gov/usbudget/fy2000/pdf/erp.pdf).

Or, as stated more succinctly by James Glassman, the ILECs "kept cheaper DSL on the shelf for a decade" to protect their higher revenue services.[160] The decision to forego replacing high revenue services with cheaper DSL is not surprising and perhaps even economically rational from the ILECs' point of view, but it was consumers and businesses that were required to bear the higher costs and poorer quality of the ILECs' earlier "high speed" services.

Moreover, it is no coincidence that after two of the "big three" CLEC DSL providers terminated operations and the third filed for bankruptcy, some ILECs announced they were scaling back their DSL investment (significantly, even this maneuver did not prevent them from achieving the record-breaking growth discussed above, so that they now control over 90% of DSL customers).[161] For example, in October 2001, SBC scaled back its original deployment plan for Project Pronto and reduced capital spending by 20% in 2002 [162] The general recession notwithstanding, it is apparent from the ILECs' modest scaling back of their DSL deployment that ILECs no longer feel the need to invest quite so rapidly in DSL in light of the diminished threat of competition from CLECs.

It is also worth noting that some ILECs substantially raised prices for DSL service once the largest CLEC competitors exited the marketplace; a circumstance that never would have happened in a competitive market. For example, in October 2001, SBC raised its wholesale prices for DSL services by approximately 15% (while at the same time admitting that its cost to

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[160] James Glassman, "Best Remedy for Recession? Break Up the Bells," http://www.techcentralstation.com/NewsDesk.asp?FormMode=MainTerminalArticles&ID=131 (December 10, 2001).

[161] New York Times, August 6, 2001, at C1 "Bell Companies Blamed for D.S.L.'s Woes."

[162] SBC Advanced Solutions, Inc., Tariff FCC No. 1, pp. 60-69 (eff. Sept. 10, 2001); SBC Second Quarter Briefing, at 5.

provide DSL was declining).[163] As a group of distinguished economists explained in a December 2001 letter to Commerce Secretary Donald Evans: "both history and economic theory have taught us [that] deregulating a monopoly without genuine prospects for competition does not induce it to deploy more infrastructure, only to exploit more severely the infrastructure that it has already in place by limiting its use and raising its price."[164] In a perfect illustration of this point, SBC reduced investment and raised prices as soon as the threat of broadband competition diminished.

The *NPRM* fails to acknowledge that it is competition, not deregulation, that best motivates ILECs to invest in broadband and that it is the availability of incumbent networks on a common carrier unbundled basis to competitors that permits them to provide services that can compete with ILECs. Accordingly, the Commission should conclude that requiring ILECs to provide broadband facilities to ISPs as part of Title II obligations will help achieve the competition that can best encourage ILECs to build broadband networks.

IX. CLASSIFICATION OF THE TRANSMISSION COMPONENT OF WIRELINE BROADBAND INTERNET ACCESS AS A TELECOMMUNICATIONS SERVICE IS ESSENTIAL TO THE LONG TERM VIABILITY OF UNIVERSAL SERVICE FUNDING

Section 254 of the Act requires carriers that provide interstate telecommunications services to contribute to universal service programs and permits the Commission to require any

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[163] SBC Investor Briefing, "Second-Quarter Diluted Earnings Per Share Increases by 8.9% with Focus on Disciplined Financial Management," Growth Drivers (July 25, 2001) at 5 ("SBC continues to improve the economics of DSL. Acquisition costs have declined by more than 25 percent since the fourth quarter of 2000 due to modem cost reductions and operational improvements." http://www.sbc.com/Investor/Financial/Earning_Info/docs/2Q_IB_FINAL_Color.pdf (viewed March 1, 2002)).

[164] Letter from William J. Baumol et al. to Honorable Donald L. Evans et al., dated December 11, 2001, at 3.

provider of interstate telecommunications to contribute if the public interest requires. Section 254(d) provides that:

> Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carriers' contribution to the preservation of and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.[165]

As the U.S. Court of Appeals for the Fifth Circuit found in its decision remanding aspects of the Commission's universal service rules, although Section 254(d) on its face seems to identify only the carriers that must contribute, it may also limit contribution liability to the provision of interstate telecommunications or telecommunications service.[166] The 5th Circuit's recent universal service remand calls into question the Commission's authority to impose assessments on a carrier's provision of service other than interstate telecommunications.

The Commission tentatively concluded in the *NPRM* that wireline broadband Internet access service is provision only of an information service. Thus, the Commission stated that a wireline broadband Internet access provider is not offering or providing telecommunications to anyone, rather the provider is using telecommunications to provide only Internet access service. In addition, as noted, the network is rapidly moving toward a fully packetized network using IP so that the Internet will be the network. Thus, because classifying wireline broadband Internet access service as an exclusively information service may remove these services from universal

[165] 47 U.S.C. § 254(d).

[166] *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).

service contribution requirements, the Commission's tentative conclusion in the *NPRM* that wireline broadband Internet access providers are providing only an information service threatens the long-term viability of universal service funding. Therefore, the Commission will be best able to assess universal service contributions on facilities-based broadband Internet access service providers if it concludes in this proceeding that wireline broadband Internet access service includes a separate offering of telecommunications service.

X. CONCLUSION

For the reasons stated herein, Joint CLEC Commenters respectfully request that the Commission adopt the recommendations set forth in these Comments.

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